Public Utilities

FORTNIGHTLY

September 10, 1942

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

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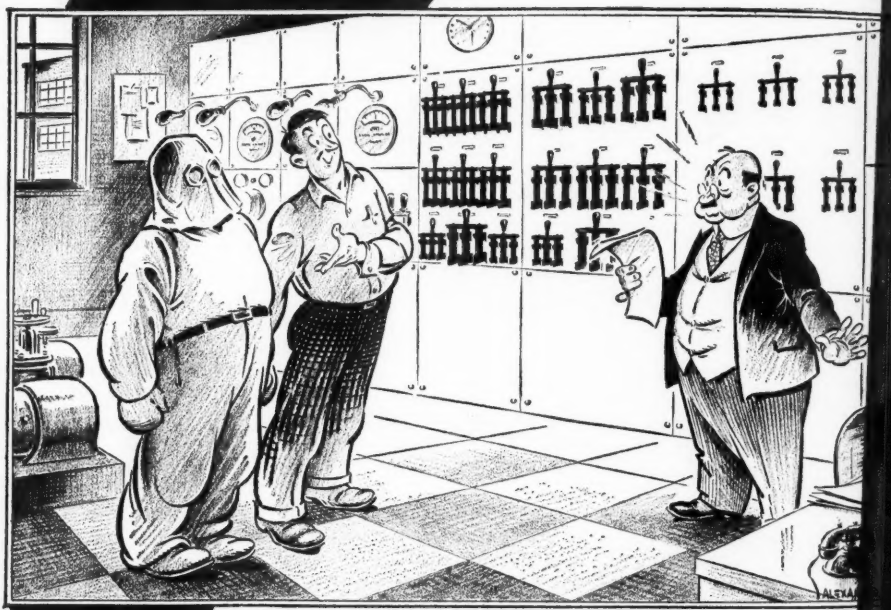

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Public Utilities Fortnightly

VOLUME XXX *September 10, 1942* NUMBER 6

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

Advertising Section

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

A PICTURE of rural Britain's possible future is contained in a report recently completed by a committee set up by the Minister of Works and Buildings in consultation with the Minister of Agriculture. This committee, formed by Lord Reith in October, 1941, and headed by Lord Justice Scott, covered the whole field of rural construction, development, and the location of industry with regard to the economic and social well-being of the inhabitants, as well as preservation of the beauty of the countryside.

AMONG other recommendations for improved living and working conditions, we find special reference to rural utility services. Electricity, the committee, asserted, should be as cheap in the country as in the city, while larger villages should have a main water supply. All farms should have water piped in the house, and gas service should be extended to the country.

THAT is a pretty picture of a post-war England and we hope it comes true. Certainly the long-suffering British countrymen deserve such elementary comforts of public service.

FRANK WARREN

Some regulatory short cuts can be more trouble than they are worth.

(SEE PAGE 344)

But why stop with Great Britain? Why should not the comforts of utility service be extended to all post-war Europe on a basis of lasting peace? Is it possible that in the very act of extending of such public service standards to the masses of Europe, a basis for lasting peace can itself be established?

PAUL B. COFFMAN

In the final analysis, it is the investor who determines what is a reasonable return.

(SEE PAGE 350)

IN this issue COLONEL T. H. MINSHALL explores this thought-provoking question. Could it be possible that the hand that controls the switchboard of a unified and integrated European utility service might also control the peace of Europe *ex officio?* Of course, such a question assumes that a unified and integrated public service would be established in post-war Europe. Certainly that is not a fact at present.

COLONEL MINSHALL'S earlier article appeared in the August 27th issue of PUBLIC UTILITIES FORTNIGHTLY. COLONEL MINSHALL is a member of the Institute of Electrical and Civil Engineers of London, where he is now located during the war emergency. He was

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associated with the birth of the British electric grid. He is also familiar with the power systems of the United States, Germany, and other foreign countries and has been an active participant in the work of the World Power Conference. For twenty years he has been consulting engineer of the well-known *British Railway Gazette* and associated with the International Railway Congress. His recent book, "What to Do with Germany," is a current best seller on the subject of post-war European organization.

IN this issue, ERNEST R. ABRAMS, well-known New York writer and interpreter of business economics, exposes the fallacy of trying to throw the monkey wrench of taxation into the wheels of industry and at the same time expect production to go merrily on. MR. ABRAMS' article is the second in our series of analyses of pending Federal tax legislation. Another article along this line will appear in our next issue.

PAUL B. COFFMAN, whose concluding instalment of his 2-part series on "The Direct Approach to the Fair Return Question" appears in this issue (beginning page 350), is now vice president in charge of valuation and research of Standard & Poor's Corporation, New York city. MR. COFFMAN was formerly a member of the faculty of the Graduate School of Business at Harvard University. He was formerly executive vice president and general manager of Poor's Publishing Company of Worcester, Massachusetts, and took his present post upon the consolidation of that organization with his present company.

ERNEST R. ABRAMS

Taxation should not be designed to make business corporations impossible.

(SEE PAGE 333)

FRANK B. WARREN, whose article on short-cut ideas of rate making (beginning page 344) somewhat traverses the discussion by MR. COFFMAN, is the assistant solicitor general of the National Association of Railroad and Utilities Commissioners. His articles have previously appeared in the FORTNIGHTLY. Before taking his present post at Washington, MR. WARREN, an engineer graduate of the University of Nevada, had considerable experience in state and Federal regulation.

WE heard the other day of a harrowing experience with a utility angle which came to a conscientious newspaper reporter. Lest the same thing happen to other newspaper reporters and other utilities we record it here; although, in the spirit of charity, both must remain nameless. It seems the special guard of a large gas works recently spied a dark-muffled figure trying to wiggle over a fence surrounding the plant. Suspecting a saboteur, he promptly collared the suspicious character. The latter claimed that he was just a newspaper reporter who had been assigned to attempt to gain entry to the plant as a basis for a special feature on whether or not the city's utility properties were being adequately patroled.

THE fellow had press credentials all right, but as a matter of routine the guard asked him the name of the editor who had given him the assignment. He said he could not remember the editor's name, having just recently come on the job. Whereupon, the guard called up the newspaper office and the voice at the editor's desk responded that he had never heard of such a newspaper reporter.

To make a long story short, it turned out that the man actually was a new reporter and that the editor who had given him such a silly assignment had gone off duty without leaving a record of it. The matter was straightened out after the reporter spent several unhappy hours in the local police station, with visions of a special military trial and a firing squad staring him in the face. We don't know exactly what the moral of this tale is, unless it might be that you can't intimidate an editor (as the old story goes), no matter how scatter-brained he might be.

THE next number of this magazine will be out September 24th.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 193-256, from 44 PUR(NS)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

NEIL CAROTHERS
Dean, College of Business Administration, Lehigh University.

". . . our present problem is not the Federal debt."

DAVID E. LILIENTHAL
Chairman, Tennessee Valley Authority.

"When politics walks in the door of management, business principles are kicked out the window."

EDITORIAL STATEMENT
Industrial News Review.

". . . if the automobile wheels of this country are actually brought to a standstill, it will be like a giant bound hand and foot."

JOHN M. VORYS
U. S. Representative from Ohio.

"There is no nice, comfortable way to win a war. . . . In order to be tough on the enemy, we must be tough on ourselves and on each other."

WILLIAM L. BATT
Vice chairman, War Production Board.

"If government runs business badly the chances are it will be because business hasn't tried to help government in the tasks which government sees before it."

HAROLD L. ICKES
Secretary of the Interior.

"No government in the world has ever had, or ever can have, unanimity. Unanimity is to be found only in a cemetery. Living men and women will always have a certain amount of disagreement."

ROBERT P. PATTERSON
Under-Secretary of War.

"It is my view that we will be unable to secure maximum military output from our economic system unless the government and its contractors are able to plan without harassment by wild price movements."

H. P. LIVERSIDGE
President, Philadelphia Electric Company.

". . . for the soldier— . . . whether he realizes it or not, electricity is an umbrella of fighting planes over his head and a wall of tanks to back him up. For electricity is the power that has shaped his weapons."

CHESTER H. LANG
Vice president, General Electric Company.

"In the punctuation of electrical progress, there may be commas, there have been exclamation points, there will always be—for a time—question marks, but there is no period. That emblem of finality cannot exist for the electric light and power industry or its partner in progress, the electrical manufacturing industry."

EDITORIAL STATEMENT
Birmingham (Ala.) News.

"The government seems (whether intentionally or not may be a question) to have played into the hands of the advocates of government ownership of public utilities. Owners of large utility holding companies report they are having difficulty disposing of some of their properties as they are being pressed to do under provisions of the Public Utility Holding Company Act. . . . The competition of such enterprises as the TVA has tended to discourage private investment in many instances."

HENRY A. WALLACE
Vice President of the United States.

"I am sure that all of us who treasure the American tradition are keen to see the time of peace bring a more adequate protection of small business and of private enterprise through a more workable relationship between capital, labor, and government. Of necessity, when the peace comes, all thoughtful men of influence in government, business, labor, and agriculture must concern themselves profoundly with the relationship between the private economic structure and governmental planning."

JOSEPH B. EASTMAN
Director, Office of Defense Transportation.

"It is quite evident that to a considerable extent shoe leather will have to take the place of rubber and that the civilian population will find it necessary to substitute leg power, afoot or on bicycles, for much gas power. To my way of thinking this will have its compensations, for the legs of the American people were by way of becoming atrophied. Travel for mere pleasure or sight-seeing and the insatiable appetite of the public for all manner of conventions must also be curbed and brought within much narrower bounds."

ERNEST T. WEIR
Chairman, National Steel Corporation.

"Certainly if private enterprise is not able to help ameliorate the conditions we can expect at the end of the war, that will be the end of private enterprise. Government will be the only thing left. And there is nothing in the recent trend of government to indicate that, with such an opportunity, government in America will do other than government has done elsewhere—take full control over all the activities of its people."

DAVID LAWRENCE
Editor, The United States News.

"The instinct to totalitarianism is not a difficult one to find in our midst. Some of our most zealous liberals have it—they are already talking in intolerant manner about shooting hostile critics and suppressing unpalatable criticism. Some of our most zealous conservatives have it—they would like to see the liberals deported and a 'strong' government substituted. These groups do not know it, but they are totalitarians under the skin—they are afraid of the democratic process and they do not wish to face the sacrifices that must be made in order to discipline democracy without destroying it."


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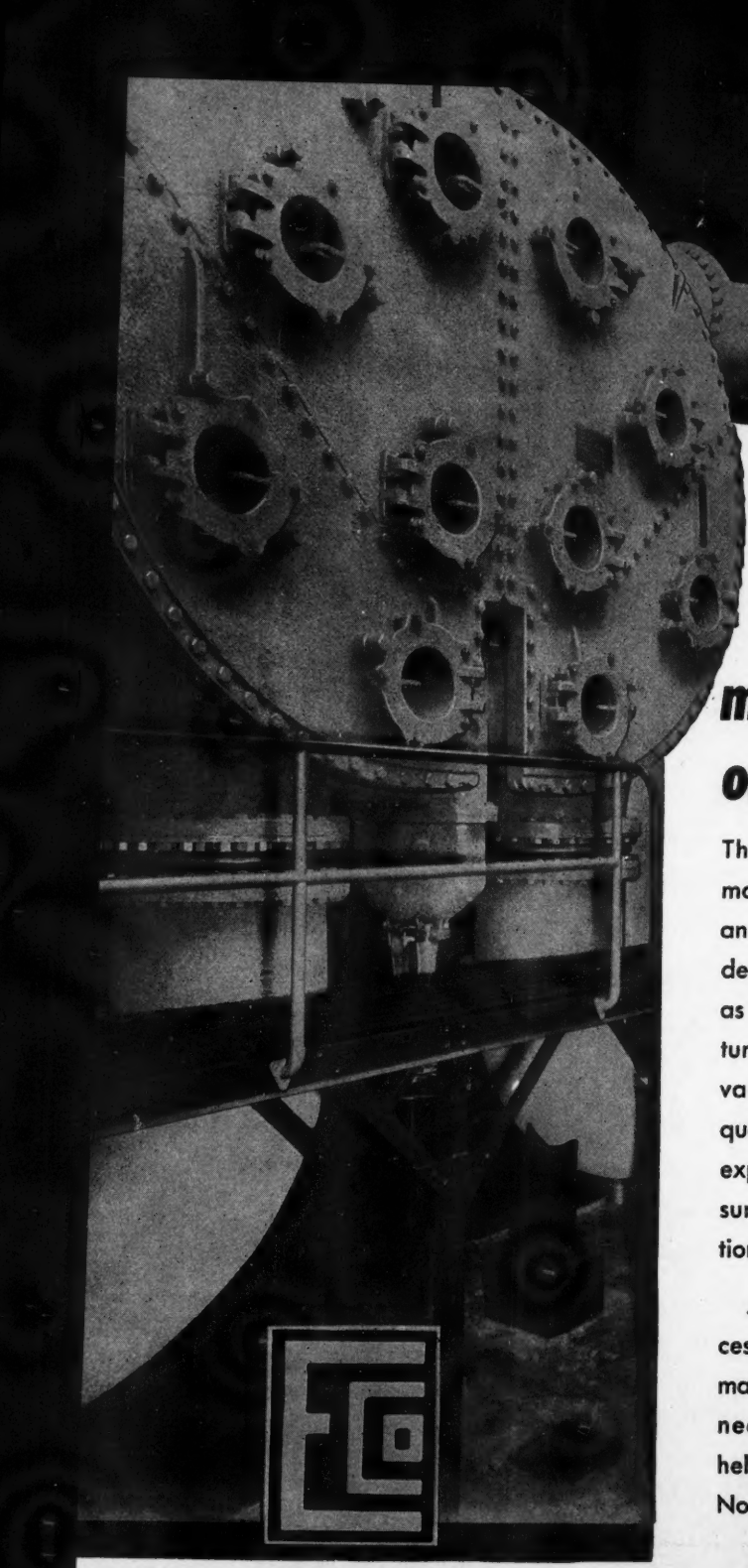

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Utilities Almanack

Due to war-time travel restrictions, conventions listed are subject to cancellation.

SEPTEMBER

10	T^{h}	¶ *Pacific Coast Gas Association will hold session, San Francisco, Cal., Sept. 28, 1942.*
11	F	¶ *American Transit Association concludes meeting, Chicago, Ill., 1942.* ¶ *Pennsylvania Electric Association holds meeting, Philadelphia, Pa., 1942.*
12	S^{a}	¶ *American Gas Association will hold annual meeting, Chicago, Ill., Oct. 5, 6, 1942.*
13	S	¶ *National Safety Congress and Exposition will be held, Chicago, Ill., Oct. 5–9, 1942.*
14	M	¶ *League of North Dakota Municipalities starts meeting, Dickinson, N. D., 1942.*
15	T^{u}	¶ *Kentucky Independent Telephone Association opens meeting, Ashland, Ky., 1942.*
16	W	¶ *Municipal Electric Utilities Association of New York State starts meeting, Lake Placid, N. Y., 1942.*
17	T^{h}	¶ *International Association of Electrical Leagues opens conference, Cleveland, Ohio, 1942.*
18	F	¶ *American Water Works Association, Western Pennsylvania Section, starts meeting, Pittsburgh, Pa., 1942.*
19	S^{a}	¶ *United States Independent Telephone Association will hold meeting, Chicago, Ill., Oct. 13, 14, 1942.*
20	S	¶ *Independent Petroleum Association of America will convene for session, Wichita, Kan., Oct. 13–15, 1942.*
21	M	¶ *International Asso. of Elec. Inspectors, Southwestern Sec., convenes, Fresno, Cal., 1942.* ¶ *Illuminating Engineering Society opens meeting, St. Louis, Mo., 1942.*
22	T^{u}	¶ *Association of Iron and Steel Engineers starts technical conference, Pittsburgh, Pa., 1942.*
23	W	¶ *Kentucky Municipal League starts meeting, Mammoth Cave, Ky., 1942.*

Courtesy of Argent Galleries *From Elsie Hafner, N. Y*

Symbols of Changing Man

By Margaret Brassler Kane

Public Utilities

FORTNIGHTLY

VOL. XXX; No. 6 SEPTEMBER 10, 1942

The Power to Destroy

Indiscriminate taxation of public utilities on the same drastic basis as that proposed for nonregulated industries is unfair and likely to prove ruinous in some instances, according to this author.

BY ERNEST R. ABRAMS

THAT oft-quoted, century-old remark of Chief Justice John Marshall that the power to tax is the power to destroy carries added significance to the holders of public utility common stocks today. For taxation of these super-regulated enterprises over any substantial term at rates provided in the House War Revenue Act means their ultimate destruction as private undertakings. What chance they have of survival as privately owned, tax-paying enterprises rests with the willingness of Congress to outlaw politics for the duration. And in a year in which all members of the House and a third of the Senate are seeking reëlection, that's practically a forlorn hope.

At the outset suppose we measure the effect of Federal income and excess profits taxes on operating utilities at rates adopted by the House on July 20th. Listed in Table I are pertinent data on 15 operating companies, both as reported and under House rates. Note that if these substantially higher rates had been applicable to last year's operations, the aggregate Federal income and excess profits tax bill of these 15 systems would have been almost 42 per cent higher than that actually being paid. And, as a result, that aggregate gross income would have been cut by nearly 16 per cent, net income by 23 per cent, and the balance of earnings available for dividends on common stock by

more than 28 per cent. Moreover, the rate of return on combined capital and surplus would have been reduced from 5.99 per cent to 5.03 per cent, and on utility plant from 5.49 per cent to 4.63 per cent.

NOR is that the complete picture. On the basis of 1941 reported operations, these 15 utilities earned bond interest 3.43 times and total fixed charges 3.14 times. And even had the House rates been in effect last year, bond interest and fixed charges still would have been earned 2.89 times and 2.65 times, respectively. On that showing the average company in this group doubtless could have secured needed funds through the sale of debt securities, provided Securities and Exchange Commission approval was forthcoming. Likewise, on the basis of reported earnings, preferred dividend requirements (Detroit Edison and Hartford Electric Light had only common stock outstanding) were earned 5.46 times in 1941, and would have been earned 4.20 times, even had the House rates been in effect. On that ratio it appears probable that the average company in this group still could have raised needed capital through the sale of preferred shares, assuming, of course, that the SEC approved.

But the balance of actual earnings accruing to common stock last year was at the rate of only 6.46 per cent on combined equity shares and surplus, which would have been cut to 5.39 per cent had the House rates for Federal income and excess profits taxes been in effect. And with investors pricing the common shares of predominantly electric operating utilities on quoted markets to yield an average return of 12 per cent or more, only the highest grade operating utilities had any chance of engaging capital during 1941 through the sale of common stock. Obviously, the harsh treatment accorded these regulated enterprises does not improve their prospects of selling common shares today.

To be sure, Congress alone is not wholly responsible for the plight of utilities today. The Securities and Exchange Commission might well shoulder a part of the blame for the predicament in which these regulated enterprises now find themselves. The SEC continues to apply the formula, first announced in its El Paso Electric decision, that, except in extenuating circumstances, debt contracts must not comprise more than half a utility's combined capital and surplus. Its staff members still talk curiously about the ability of operating companies to finance expansion programs through the sale of common stock. In addition, the SEC has refused to abandon its self-imposed mandate to press the "death sentence" for holding companies for the duration.

THIS combination of House application of the same Federal tax rates to regulated and unregulated enterprises alike, plus the SEC's zealousness in pressing integration plans, come war, hell, or high water, plays into the hands of public ownership advocates. Into the hands of folks who imagine the vital problem facing America today is not winning a war, or the establishment of the "Four Freedoms," but of making the world safe for bureaucracy.

Not that public utilities are seeking to dodge their full share of the cost of

licking the Axis, however much it may be. They are public service corporations in the fullest meaning of that term. They are more than willing to accept any burden of taxation equitably imposed on all types of American enterprise. But they do feel that when the public has regulated them for thirty-five years, solely to insure they earn no excess profits, they should not be taxed on the same basis as enterprises which have no other ceiling on their profits than those established by competitors. Moreover, although politicians are loath to admit it, what the public ever has regulated has been utility profits, not their rates. It's been sort of punishment for efficiency.

Some folks, of course, will argue that all types of American enterprise, except agriculture, now are being regulated. They say that the Office of Price Administration has established ceilings over the retail prices of all vital commodities. But that contention has a hole in it big enough to drive a truck through—provided you can get tires and gasoline. For all those ceilings have been established by bureaucratic edict, not by legislation. And OPA can raise them, lower them, or set them aside at the discretion of Price Administrator Leon Henderson. You will recall that Mr. Henderson, on June 27th, having decided the costs of shipping petroleum products to the eastern

TABLE I

Effect of House Federal Tax Rates on Earnings of Fifteen Operating Electric Utilities

1941 Data on

Atlantic City Electric, Cleveland Electric Illuminating, Connecticut Light & Power, Consolidated Gas of Baltimore, Consumers Power, Detroit Edison, Georgia Power, Hartford Electric Light, Kansas City Power & Light, Ohio Edison, Philadelphia Electric, Potomac Electric Power, Rochester Gas & Electric, San Antonio Public Service, West Penn Power

Investment in Utility Plant	$2,311,196,000
Capital and Surplus	2,118,873,000
Funded Debt	1,043,716,000
Common Stock and Surplus	914,415,475
Common Shares Outstanding	33,648,167

	Reported	*Under House Rates*	*% Change*
Operating Revenues	$479,969,000	$479,969,000	.....
Taxable Net Income-X*	121,651,000	121,651,000	.....
Income and Surtax	33,672,000	45,822,000-X	+36.09
Excess Profits Tax-**	14,228,000	22,037,000-X	+54.96
Total Income and Excess Profits Tax	47,900,000	67,859,000-X	+41.67
Gross Income	126,966,000	107,006,000-X	—15.72
Per Cent Capital and Surplus-X	5.99	5.03	
Per Cent Utility Plant-X	5.49	4.63	
Net Income	86,569,000	66,609,000-X	—23.06
Balance for Common and Surplus	70,715,000	50,755,000-X	—28.22
Per Common Share	2.10	1.51	

* Estimated on basis of taxes actually paid and rates applicable.

** Atlantic City Electric, Consolidated Gas of Baltimore, Georgia Power, Potomac Electric Power, and Rochester Gas & Electric report their belief they were not liable to excess profits taxes in 1941.

Source: Data published by Institutional Utility Service, Inc., plus certain calculation by the writer, indicated by X.

seaboard had risen inordinately, boosted the retail price of gasoline in eastern states by 2½ cents a gallon, and the price of fuel oil by 2 cents a gallon.

But no matter how much the cost of generating and distributing electricity may rise during the emergency, Mr. Henderson can't do a thing about it. He can't order an increase in retail rates for electricity or gas or communication or any other type of public service. He hasn't any authority over them. Interstate movements of gas and electricity, of course, are under the control of the Federal Power Commission, while interstate communication falls under the jurisdiction of the Federal Communications Commission. But intrastate rates for these services are subject only to the control of state and local authorities. Only state public service commissions, or city councils in states where commission jurisdiction is lacking, may order utility rate increases. And experience has shown that attempts to secure commission approval of rate boosts generally have been subject to long delay and fraught with bitter controversy. Rate schedules, in fact, are like the hill we kids used to slide down in winter; easy to slide down but hard to climb up.

To illustrate the advantages increased Federal income and excess profits taxes give public ownership advocates, let's look at a current fuss. Both the city of San Antonio and the Guadalupe-Blanco River Authority, a power project of the state of Texas, now are "lawing" about who has the right to buy San Antonio Public Service, Inc., an operating unit of the American Light & Traction-United Light & Power group, which the SEC, in its "death sentence" drive, insists must be sold.

During 1941 this operating utility had operating revenues of $10,722,000, a little over 53 per cent of which came from sales of electricity. The other 47 per cent resulted from sales of gas and transportation, or from miscellaneous sources. During 1941 San Antonio Public Service paid a total of $2,014,000 in taxes, of which $1,078,000 went to the Federal government as income and excess profits taxes. In addition it paid other Federal taxes, such as an excise on sales of electricity at retail, levies on its capital stock, and interest paid on outstanding bonds. Moreover, San Antonio Public Service accrued $1,086,000 for depreciation last year, and it ended up with $1,779,000 as gross income, with which to pay the wages of the capital it employed. When it got through paying contractual capital hire—fixed charges and preferred dividends—it had $778,000 left for its common stockholders, roughly $9.38 for each of its 83,000 outstanding common shares.

What would you pay for that company? Had these earnings prevailed in the good old days, some optimist doubtless would have valued San Antonio's common shares on a 5 per cent basis. That's an over-all price of $38,315,000 for the whole works. But those ready buyers weren't faced with the Federal taxes levied against private buyers today.

San Antonio Public Service, as previously noted, paid $1,078,000 in Federal income and excess profits taxes last year, which would have been boosted to $2,487,700, had the new House rates been in effect. That, of course, is exclusive of excise taxes on retail sales

TABLE II

Turnover of Capital in Various Industries and Investment in Tangible Net Worth Required to Produce $1 of Annual Gross Revenues

Industry and Type	*Turnover of Tangible Net Worth Per Year*	*(A) Indicated Investment Per Dollar of Gross*
Electric Power & Light—X	0.24	$4.17
Manufacturers		
Women's Coats and Suits	7.08	0.14
Silk and Rayon Goods	5.98	0.16
Women's Shoes	4.71	0.21
Meat Packers	4.67	0.21
Chemicals	2.58	0.39
Auto Parts and Supplies	2.51	0.40
Furniture	2.48	0.40
Electrical Supplies	2.10	0.48
Hardware and Tools	2.04	0.49
Foundries	1.78	0.56
Paper	1.75	0.57
Machinery	1.48	0.68
Wholesalers		
Butter, Eggs, and Cheese	10.43	0.10
Fruits and Fresh Produce	9.45	0.11
Women's Coats and Suits	6.48	0.15
Groceries	5.86	0.17
Paper	4.57	0.22
Electrical Supplies	4.45	0.22
Drugs	3.65	0.27
Women's Shoes	3.47	0.29
Auto Parts and Supplies	3.07	0.33
Lumber	2.55	0.39
Hardware	2.51	0.40
Retailers		
Women's Shoes	3.44	0.29
Men's Clothing	2.88	0.35
Department Stores	2.59	0.39
Lumber Yards	1.60	0.63

The most rapid turnover of tangible net worth reported by Foulke was found among wholesalers of cigars, cigarettes, and tobacco, 15 of whom in 1938 turned over their tangible net worth 20.32 times in a year, or once each eighteen days, thereby requiring an investment of less than 5 cents in tangible net worth to produce one dollar of annual gross revenues.

Source: "Relativity of the Moral Hazard," by Roy A. Foulke of Dun & Bradstreet, Inc., pages 42 to 61, inclusive.

X—Edison Electric Institute data, since Foulke did not treat electric energy.

A—Calculations made by the writer.

of energy, taxes on capital stock and bond interest, Social Security levies, and miscellaneous Federal exactions. And that tax boost of $1,409,700 would have been more than $630,000 higher than the company earned on its common stock.

Yet, the city of San Antonio reportedly has bid $34,600,000 for the company.

SOUNDS screwy, doesn't it? Well, it isn't from the city's position. In 1941 San Antonio Public Service had a funded debt of $18,255,000 on which interest alone ran at an average of 3.42 per cent. In addition it had $4,500,000 of 6 per cent preferred stock outstanding, while its common stock, on which it earned $778,000, was carried on the books at $5,810,000. Earned and

capital surplus added another $779,765. Let's assume, now, that either the city of San Antonio or the Guadalupe-Blanco River Authority buys the company. Where will they get off?

Well, San Antonio Public Service had a 1941 gross income equivalent to 6.06 per cent of combined capital and surplus, or to 5.13 per cent on the price bid by the city. But either of these public bodies doubtless can sell tax-free revenue bonds at a maximum money cost of at least 4 per cent and more likely 3½ per cent. At any rate either the city or the authority probably could reduce the cost of money to the private company by a third, since bonds would be sold to cover the full purchase price. And capitalized at 4 per cent, this would mean an $832,000 advantage to the public buyer.

But that's only a piker advantage. Wait and see what's coming. Since the public body buying this property doubtless will sell serial bonds, and thereby steadily reduce its debt, it probably won't bother with such a foolish thing as depreciation. Can you just hear local politicians arguing, "We're reducin' our investment all the time, ain't we? So why do we need depreciation?" Well, that $1,086,000 the private utility accrued for depreciation is equivalent to 3.13 per cent on the price bid by the city of San Antonio, and would almost equal the city's annual interest bill. Or it would amount to more than $27,100,000 capitalized at 4 per cent.

For a third thing, since all public enterprises walk past Federal tax collectors with their thumbs to their noses, the whole $1,078,000 San Antonio Public Service paid in Federal income and excess profits taxes last year, or the $2,487,700 it would have paid, had the House rates been in effect, becomes clear profit to the public buyer. And this larger saving is equivalent to 7.9 per cent on the price bid by the city. Capitalized at 4 per cent this tax saving amounts to more than $62,000,000.

See how it works out? As a result of financing its full investment through the sale of tax-free bonds, the public buyer can make a saving in the cost of money of around $520,000; by ignoring depreciation it can save $1,086,000 in operating costs; and being exempted from Federal taxation it can save another $2,487,700 which private enterprise would have to pay. Altogether, the public buyer of San Antonio Public Service will have an advantage in various savings of slightly more than $4,000,000.

Now, let's look at this business of taxing regulated and unregulated enterprises at the same rates from another point of view. A couple of years ago, Roy A. Foulke of Dun & Bradstreet, Inc., wrote a book entitled "Relativity of the Moral Hazard." From its title you wouldn't think it had much to do with this discussion, but it has. You see, Mr. Foulke devoted some twenty pages to the speed with which various kinds of businesses turn over their capital, which is another way of saying how much must be invested in them to produce $1 of annual gross sales. Some of his data, plus calculations by the writer, are set out in Table II. Be sure, when looking at it, to remember that all calculations are based on tangible net work—on the capital invested by partners, plus surplus and reserves, but excluding borrowed money.

Foulke's discussion, of which this is but a meager part, has caused much controversy in economic circles. Some folks contend that electric utilities, with their relatively low turnover and high proportion of funded debt, are no exception in the list of heavily taxed industries. Others believe they are. But whatever the outcome of this academic fuss, it would appear to hard-working folks that the electric utility's ex-debt investment of $4.17 for each dollar of annual gross revenues puts it in a slightly different tax position than, let's say, wholesalers of cigars, cigarettes, and tobacco, who, turning their capital over once each eighteen days, require an investment in tangible net worth of less than 5 cents to produce an annual gross dollar.

Moreover, some folks contend that because electric utilities, to select one of the regulated industries, make the stuff, ship it to points of use, and eventually deliver it to ultimate consumers, it isn't proper to compare their investment in plant and working capital, per dollar of annual revenue, with that of industries whose products flow from manufacturer to wholesaler or jobber to retailer to customer. Mr. Foulke, unfortunately, hasn't been much help in this respect. He has carried only one of commodities from start to finish—from the factory to the feet. In the manufacture, wholesaling, and retailing of women's shoes, he found an investment of 79 cents was required to produce $1 of annual gross sales. But he listed six other commodities in which one phase of investment was lacking. He said, for instance, that the wholesaling and retailing of lumber required a tangible net worth investment of $1.02 to produce $1 of annual revenues. In addition, with investment in retail outlets missing, he said it required, to produce an annual gross dollar, 29 cents to make and wholesale women's suits and coats, 70 cents for electrical supplies, 73 cents for auto parts and supplies, 79 cents for paper, and 89 cents for hardware. All of them fall far short of the $4.17 investment in tangible net worth required by electric utilities.

At this point some of you doubtless are asking, "Well, what of it?" Just this. Any enterprise requiring so great an investment in tangible net worth to produce an annual gross dollar as electric utilities and, therefore, dependent upon the whims of a fickle investing public for expansion capital, must be permitted to earn a rate of return adequate to attract risk capital. Otherwise, with a ceiling established over their maximum rate of return by state or local regulation, and their earnings being siphoned away under the guise of excess profits taxes, not only are electric utilities being cut off from the free flow of capital, their very lifeblood, but they are being denied any opportunity to live off their own fat.

The Federal tax collector is the villain in this show. In 1932 state and local taxes absorbed 22.0 per cent of electric utility net income before taxes; in 1941 these exactions consumed only 20.7 per cent of that income. But where Federal taxes took 6.4 per cent of net income before taxes in 1932, they gobbled up 28.0 per cent in 1941—a boost of 531.25 per cent in a decade.

Policing of European Peace Through Utility Control

The hand that controls an international utility switchboard might well rule the peace of Europe. Why should not that hand belong to a post-war international peace tribunal in Switzerland, subject to Allied supervision?

By COLONEL T. H. MINSHALL, D.S.O.

THE New European Order which the democracies aim at establishing—in place of Hitler's—will, if completely carried out, affect many sides of life. Much has already been written about changes in Europe's political structure and some thought is already being given to the economic questions involved. Little has been published about another branch of the problem—the control of public services. This, however, will form an important part of our dual aim—the control of war potential in order to lessen the danger of new aggressions and the rationalization of trade and industry as an aid to greater economic prosperity. The control of public services affects both "security from war" and "security from want." It will arise on the cessation of hostilities and if planned in advance will materially assist in food distribution, reduction of dislocation, and restoration of order and of trade.

The principal services concerned and considered and here discussed are transportation, communications, power, and information. Since Germany overran Europe a certain amount of centralization and coördination of these services has taken place. The present conditions are not accurately known but the following is believed to be the general position:

The Present Position

TRANSPORTATION

THE control of the central European railway systems is now largely centralized in the Reischbahn-Amt, and of waterways in the Reichs-

Kanal Amt, both in Berlin. The main motor roads are controlled by the Todt organization. The Lufthansa organization (always closely associated with the Luftwaffe) already, with its affiliations, covered a large part of central Europe and in addition was financially interested in various foreign air services (*e.g.*, Basle Air and possibly K.L.M.). Government control is now much closer.

COMMUNICATIONS

THE post, telegraph, and telephone systems (with which for some time past the Gestapo and General Stab have had a close liaison) have partially absorbed or been combined with those in the overrun countries, though in some cases the separate managements (under German control) still operate. Much the same conditions apply to the radio systems, though in this case the Propaganda Ministry, Gestapo, and, where they can, the General Stab have a voice in the control.

POWER SUPPLY

THE bulk of the electric power supply in Germany itself, was until about 1935 mainly given by companies, in certain of which state governments and even the Reich government itself held shares, though local distribution was often in municipal hands, with or without provincial cooperation. Strict control of all the more important companies has been since 1933 exercised by government-appointed directors being put on the boards as in Berlin.

German electrical companies—both manufacturing concerns like the A. E. G. and Siemens Schuckert and the supply concerns like the Rheinische-Westphalische A. G. had, prior to 1939, acquired considerable interests in certain Swiss power companies, probably in some north Italian companies and possibly in the Dutch and French systems (in the Jura) and one in Bohemia. They may also have been interested in the Sofina international company, but this is not certain. Germany is believed to have started on plans for a European "grid" and the further development of Austrian and Bohemian water power.

There thus already exists a considerable measure of concentration in central European electric power supply.

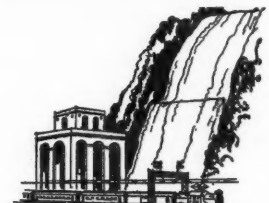
INFORMATION

LITTLE accurate information is available as to the extent and nature of German interests in the foreign press and radio systems. It is known, however, that large subventions were paid out from Berlin to foreign newspapers, many of whom now have German editors.

Proposed International Control

SCIENTIFIC progress has resulted in extending the efficient size of transportation and power systems much beyond the areas of small states. There are, for example, electric grids in the USA covering much larger areas than Switzerland. If the importance and meaning of frontiers in the political and economic sense are to be modified in the New Europe, advantage should be taken of this to extend and rationalize the systems of certain public utilities. There is no scientific or economic reason why third-class passengers or electric voltages should change at political frontiers.

But if these enlarged systems are to



Power Supply in Germany

"THE bulk of the electric power supply in Germany, itself, was until about 1935 mainly given by companies, in certain of which state governments and even the Reich government itself held shares, though local distribution was often in municipal hands, with or without provincial coöperation. Strict control of all the more important companies has been since 1933 exercised by government-appointed directors being put on the boards as in Berlin."

include the areas of more than one state, they must obviously come under international control. Equally, even though private enterprise might be more efficient, in this case the *control,* though not necessarily the ownership or actual operation, must be by a public authority. This does not exclude the continued use of private enterprise in the actual regional operation of the services if and where desirable.

It may be found necessary, in fact, to have two organizations. Firstly an international controlling body "The Utilities Council," and secondly an executive body or bodies to own and operate the services under the Council, somewhat on the lines of the Central Electricity Board and the authorized undertakings in Great Britain. The Council might be composed of a small number of persons of recognized competence and experience (c.f. Kiplings A.B.C. in aviation). It should be practically autonomous, though ultimately responsible to some higher policy-forming body, such for example as the I.L.O. or its equivalent.

SITE

BOTH for political and geographical reasons, Switzerland has become the site of various international authorities. Geneva is the seat of the League of Nations and Red Cross and other agencies. Brussels, the headquarters of the International Railway Congress and of other international concerns, has also been suggested.

By a coincidence, the central European *massif,* the greatest source of hydroelectric power in Europe (only partly used at present) is also centered in Switzerland. There would thus

seem to be advantages in making it the headquarters.

PRECEDENTS

SUPERNATIONAL control of roads has an old European tradition. Apart from Roman roads and the early bridge-building activities of the monks, Napoleon—mainly, though not wholly, for military reasons—created his systems of Routes Nationales. After the last World War there was a considerable extension of international coöperation in such bodies as the Central office for Railway Tariffs, Railway Clearing Houses, the International Time Table Conference, the European Airways Conference, the Postal Union, and the Union Telegraphique Universelle, etc. The germs of a supernational authority in fact then existed.

As regards electric power supply, in addition to the partial concentration by German financial interests, there was a certain measure of coöperation, though mainly on the scientific side, in connection with such bodies as the World Power Conference, the International High Tension Transmission Conference, and the International Standards Committee.

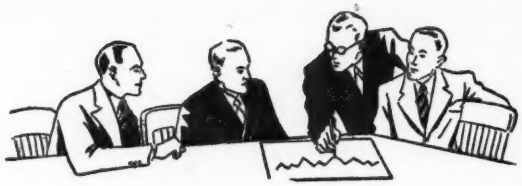
AFTER victory, the Allies will have it in their power and, for safety's sake, be obliged to compel the establishment of control of transportation, power and communications, and propaganda in enemy countries. They will need also to rationalize the first two and, to a lesser extent, the third of these services, in the economic interests of central Europe. As regards neutral countries, if suasion did not suffice to bring about their coöperation, the new international Central Authority would be in a strong position to compel coöperation.

THE FIRST STEP

IF such a policy as outlined above be adopted by the British government, the first step would be the establishment of a quite small committee, not necessarily technical, or political, and certainly not official in composition. The first duty of this committee would be to draw up a short program of study of the situation—leaving the collection of detailed data until later. The second duty of the committee would be to get into touch with the American government and seek its coöperation. The initiation of the plan would be mainly an Anglo-American affair.

TO summarize, the above plan would offer the following advantages:

1. If prepared *in advance* of the close of hostilities it would materially assist (especially as regards transport) food distribution, demobilization, and the restoration of order and trade.
2. It would provide, in addition to disarmament, which it would help to maintain, a means of checking and preventing revival of war potential.
3. It would form an important aid to the economic rationalization of central Europe, enable industry to be more evenly distributed, and thus achieve a better balance between industry and agriculture instead of concentrating the former in Germany.
4. It would provide important openings for the employment of Anglo-American capital and for the railway and electric manufacturers of both countries, prevent an undesirable Anglo-American scramble for orders, and deal with the important questions of allocation of priorities in materials.



Assured Security Profit As a Short Cut for Rate Making

The old maxim, "haste makes waste," may be just as applicable to utility rate regulation as to anything else. Such is the opinion of this author, who points to the danger and difficulty of trying to find a short cut to rate fixing via the route of allowing a marketable return on outstanding capitalization.

By FRANK WARREN

THE war has been responsible for stepping up the pace of a good many of our established administrative routines. Time, we have been told, is one of our most precious national assets. Government officials and others have been rightfully busy eliminating red tape and finding practical short cuts in all forms of governmental activity to save time.

Naturally enough, this trend has not failed to touch the field of regulation which has never been particularly noted for streamlined procedure. The decision of the Supreme Court in the Natural Gas Pipeline Case[1] establishes wide discretion in regulatory bodies as to methods which may be followed and gives impetus to the idea that better results might be obtained by forsaking the old regulatory trails and going in for something new, or at least something that might have been considered unorthodox if not actually unconstitutional just a few years ago.

This era of experiment may prove quite beneficial for public utility regulation. But there is danger in trying to go too far and too fast. We must keep in mind the circumstance that regulatory commissions came into existence for very definite reasons. We must keep in mind the fact that the inherent complications of utility regulation—complications which are the reason utility commissions continue to exist by public demand—cannot be solved by superficial simplification.

One of the most intriguing of these regulatory short cuts is the idea that rates can be fixed quickly and inexpensively by determining and providing sufficient revenues to pay interest on borrowed funds and maintain a predetermined market price for equity capital. This theory was recently expounded in a 3-part article, published

[1] (1942) 42 PUR(NS) 129, 62 S Ct 736.

in two different magazines devoted to the telephone industry.[2]

In this case the vice president of a holding company controlling a number of independent (that is to say, non-Bell system) telephone companies suggests that both the public and regulatory commissions have failed to understand the problems of the telephone industry and that this must be corrected by education. The particular principle of education which this official has in mind is the distinction between profits and the cost of capital. It is necessary, he says, to pay for the *use* of utility facilities just as one pays rent for realty or interest on a loan.

THERE is doubtful foundation for the assumption that the public does not understand that it must pay for utility service. Certainly the experience of the public over many years would indicate that it is a peculiar individual indeed who does not now realize that he must pay for electricity, gas, and telephone service "just as one pays rent." The preservation of the solvency of operating utilities should be the aim of regulatory commissions in certain circumstances. But this does not include attempting to provide revenues for interest or dividends on securities included in capital structures which may not have any reasonable relationship to the cost of the property or the reasonable whole cost of supplying service.

However, pending the education of the public and the regulatory commissions, and apparently proceeding on the assumption that most utility companies are in need of an increase in rates in order to enable them to remain in business, the writer of the article mentioned above proposed an easy solution of the regulatory commission's duty in disposing of applications for increased rates as follows:

> Where a given utility has its own securities outstanding in the hands of the public, and market prices of the various issues are readily obtainable, the matter of financial needs can be simply calculated without reference to a rate of return at all.
>
> The answer, quite obviously, is the sum total of its annual fixed charges and contractual dividends, plus an amount on the common sufficient to maintain a public market which will permit the raising of additional stock capital at a net price equal to book value. At any earning level below this sum, new funds cannot be raised except through a process of cumulative dilution of the present equity—a process which will eventually ruin the company and deteriorate the service to the community served. Any higher level, on the other hand, is unnecessary.

OF course it will be recognized that the assumption involved in the above suggestion is that all expenses charged and deducted are proper, including salaries, depreciation charges, and other important items. It would also have to follow that the book value of stock is really representative of prudent investment in property devoted to the public service.

The regulatory commissions, notably the Federal Power Commission in recent years, have been industriously hacking away at the utilities' investment accounts. Their findings would indicate that there is a considerable margin in some companies between recorded investment and "actual legitimate original cost." There may be several reasons for this, such as attempted capitalization of amounts previously charged to operation, and increases representing increases in

[2] "A New Approach to Regulation," by Walter J. Herrman, *Telephony*, June 13, 27; July 11, 1942. *Telephone Engineer*, June, 1942, July 1, 15, 1942.

value. Whatever the reason, the reduction in recorded investment will have a marked effect on the book value of outstanding stock.

Now, just by way of a practical test, let us check over the application of this theory to the corporation of which the writer mentioned above happens to be a vice president. This company is a holding company, controlling numerous operating telephone companies through stock ownership. In 1941 its gross earnings consisted of $28,270.87 in interest on bonds and notes of sub-

INCOME ACCOUNT

GROSS EARNINGS:		
Dividends and interest (including $12,185.86 paid from prior years' earnings)		$782,487.44
OPERATIONS AND TAXES		92,090.40
Net earnings		$690,397.04
INTEREST DEDUCTIONS:		
Interest on debentures	$475,374.02	
Other interest	123.02	
Amortization of debt discount and expense	40,841.51	516,338.55
Net income		$174,058.49
AMOUNT APPROPRIATED FOR GENERAL CONTINGENCIES		10,000.00
Balance of Income		$164,058.49

SUMMARY OF EARNED SURPLUS ACCOUNT

BALANCE DECEMBER 31, 1940		$1,170,128.09
ADD—Balance of income for the year ended December 31, 1941, as above		164,058.49
		$1,334,186.58
ADD—Profit on company debentures reacquired		8,433.41
		$1,342,619.99
DEDUCT—Dividends paid on preferred stocks:		
7% First preferred—$2 per share	$106,794.20	
Three dollar first preferred—$0.60 per share	234.60	107,028.80
BALANCE DECEMBER 31, 1941 (includes $885,110.84 surplus at December 31, 1932 —date of recapitalization)		$1,235,591.19

THE CAPITAL ACCOUNT (ON DECEMBER 31, 1941)

CAPITAL STOCK:		
7% First preferred cumulative—par value $100 per share	$4,917,400.00	
Participating preferred cumulative—no par value	82,770.62	
Total above stocks	$5,000,170.62	
Class A Common—no par value—authorized 100,000 shares, issued 78,437.4 shares	452,770.72	
Class B Common—par value $1.00 per share—authorized 500,000 shares, issued 450,000 shares	450,000.00	$5,902,941.34
FUNDED DEBT:		
Thirty-year 5% debentures, series A, due June 1, 1958, authenticated $13,530,000 less $1,560,000 retired and canceled	$11,970,000.00	
Less—Held in treasury, including $1,200,000 unissued	2,487,000.00	9,483,000.00
DUE TO SUBSIDIARY COMPANIES		118,500.00

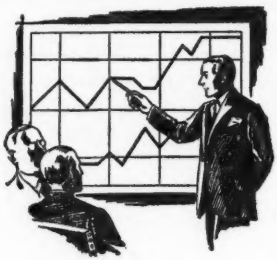
sidiaries; $749,299.90, dividends on common and preferred stock of subsidiaries; and $4,916.67 other income; a total of $782,487.44. The income and surplus accounts of the holding company for 1941, taken from the annual report to stockholders appear in the table on page 346.

THE holding company here under observation is not an operating telephone company and therefore would not be the applicant in a proceeding looking to increased rates. However, its income is mainly from dividends on stocks of operating telephone companies supplying service to 251,317 stations at the end of 1941. It should afford a basis for testing the theories of its vice president.

The company's debentures and preferred stocks apparently have an established market since the company reports that it is purchasing them "through regularly established market channels." It is not surprising that there is no mention of a market for the common stock. It will be noted that it would require an additional $5 per share or $245,870 to pay the required dividend on the company's 7 per cent preferred stock; and an additional $5,836 to pay the stated dividend on the $4 cumulative preferred. The company's annual report to stockholders also shows that accumulated unpaid dividends on the preferred stocks totaled $2,938,664.01 on December 31, 1941, or more than the stated value of the common stocks and surplus. The common stock apparently has little prospect of earnings available for dividends; and any value which attaches thereto must be related to something other than earnings.

Possibly control of the operations of the subsidiaries through the ownership of their common stocks involves collateral benefits to the owners of the holding company stock which make it worth something to them. So we find this company faced with the necessity of increasing revenues to provide sufficient to pay contractual dividends on its preferred stocks. There is no suggestion as to what should be done about the common stock in these circumstances to give it value and enable the company to do some equity financing. It is fairly clear that the preferred stockholders probably own any equity existing in the company now, and should, under prevailing regulatory principles, control the management. Should a regulatory commission completely disregard the failure of the company to earn contractual dividends on this preferred stock for many years and set about at this time to provide funds, through increased charges for public service, designed to enable payment of these dividends?

TO follow the course suggested, a regulatory commission would be required to abandon the rôle of representing the consumers as well as the investors and abdicate in favor of the investor. There may be instances where the method suggested is applicable, but to adopt it as a generality is certainly highly debatable. The public can only be required to pay, and in fact, will only pay, what the service is reasonably worth regardless of the earnings allegedly requisite to financial stability. Further, the public should not be required, in the exercise of regulatory jurisdiction, to pay more than a fair return on the fair value of the



Example of Conservative Financing

"THE American Telephone and Telegraph Company is generally conceded to be an outstanding example of conservative financing. If there ever could be a situation where the suggested rate-making procedure would be applicable it is with respect to this company. Its common stock is $100 par value, and the company has paid a $9 dividend on this stock for many years. The book value of the common stock is about $135 per share, and for some time the stock has been selling for less than that figure."

property devoted to the service. This may be an intangible and difficult formula. Yet if it is related to a reasonable rate upon the money prudently invested in the property actually devoted to public service, with appropriate consideration of changes in price levels and money costs, it is not as difficult to apply as it may seem, provided, of course, the utilities' accounting records are in the condition they should be.

The inapplicability of the suggested treatment of the revenue requirement of an operating utility in the case of a company which does not earn sufficient to pay contractual dividends on its preferred stock or any dividends on its common stock has been covered in the above discussion. Its inapplicability in the case of a company that has consistently paid interest on its funded debt and generous dividends on its common stock may also be demonstrated.

THE American Telephone and Telegraph Company is generally conceded to be an outstanding example of conservative financing. If there ever could be a situation where the suggested rate-making procedure would be applicable it is with respect to this company. Its common stock is $100 par value, and the company has paid a $9 dividend on this stock for many years. The book value of the common stock is about $135 per share, and for some time the stock has been selling for less than that figure. Under the procedure suggested it is therefore desirable and in the public interest to increase the earnings of the company to the point

where the common stock will sell at or above book value.

This will require a very substantial increase in net earnings, because the income tax collector will take the lion's share of any increase. It may be roughly calculated that it will require an increase of about $4 in net earnings to produce an increase of $1 in the amount available for dividends. Of course, the increase in charges to the public will be much larger than this for the reason that the gross earnings of the American Telephone and Telegraph Company are mostly dividends on the common stocks of operating subsidiaries. How much of an increase in dividends would be required to establish a market value for the stock of $135 or more is purely conjectural. There is no basis for calculating the amount in view of the behavior of this and other listed stocks in recent months. It is hardly conceivable that any regulatory commission would increase rates for this purpose at this time. Here is a strong, conservatively financed company with a long record of excellent earnings, and still the scheme does not seem to work out.

IT must be remembered that it will be necessary to convince the legislatures and the courts, as well as the regulatory commissions, if the rate-making procedure suggested is actually to be effective. A recent expression of the United States Circuit Court of Appeals for the Sixth Circuit, in upholding the validity of an order of the Federal Power Commission, is interesting in this connection:

> The argument that the wiping out of a large part of the petitioner's surplus will result in disastrous consequences to the value of its securities, necessarily concedes that a like result will follow whenever, under the recapture or emergency provisions, the finding of net investment of the licensee in the project is finally made effective. Indeed, the consequences may then be much more serious, for the investing public will then be lulled into a false sense of security by the passing of time. It therefore is not arbitrary nor beyond the commission's scope of authority to require that the value of capital assets for dividend or security valuation purposes shall be the same as for expropriation or recapture purposes, and be adequately disclosed, from the beginning, upon the books of the petitioner. As one court expressed it, disallowed items should not be permitted "to assume the nature of vested interests." Clarion River Power Co. *v.* Hurley, 59 Wash Law Rep 106, 108. Louisville Gas & E. Co. *v.* Federal Power Commission, decided June 29, 1942.

IT should be borne in mind that at this time a very important consideration in connection with the regulation of public utility rates is the desirability of avoiding any action which may contribute to inflation. Anything which tends to increase costs in any way should be avoided wherever possible. If an operating utility has sufficient income to "pay its bills" and carry on its business, including the provision of a reasonable return upon the remaining capital prudently invested in property actually used, there are good reasons why no increase in rates should be permitted.

Certainly no increase is likely to be permitted solely on the grounds that it is essential to the establishment of market values for securities necessary to permit the company to raise additional funds on a basis which it considers reasonable in relation to the recorded values assigned to them. If the process really contemplates the establishment of book values on some such basis as referred to by the court in the above quotation, the process is no simplification or improvement on that presently followed by the commissions.

The Direct Approach to the Fair Return Question

Part II. Determination of Capital Cost

In this concluding instalment of his 2-part series on the direct approach to the determination of fair return, Mr. Coffman analyzes in detail the application of his proposed regulatory technique to various classes of utility securities, and considers the all-important factors of tax trends and rate levels.

By PAUL B. COFFMAN
VICE PRESIDENT, STANDARD & POOR'S CORPORATION

In the first instalment of this article, we saw how conventional regulation in the past has stressed rate base appraisal at the expense of an appraisal of reasonable return. We considered the cold-blooded proposition that the credit position of a utility security or any other kind of security cannot be established by regulatory fiat. It must depend upon the price the investor is willing to pay for it.

Finally, we superimposed upon these premises a simple formula for an original approach to rate making—an approach via the rate-of-return route. We assumed that rates must be sufficient to pay operating expenses, cover properly funded obligations, and yield enough profit on risk capital to maintain the company's relative credit position. Now, let us see how we can go about ascertaining, quickly and inexpensively, a reasonable valuation of the various classes of outstanding securities, starting with bonds.

If there has been no recent financing through bonds on the part of the particular company under investigation, the cost of debt capital can be determined from the relation of interest rate and the average of the high and low quotations if the bonds are traded and there is a reliable market. Should the latter method not be feasible then the cost of capital must be determined by a study of the investors' appraisal (as previously defined) of risk of that class of capital. In other words, if the 3 per

cent first mortgage sinking-fund bonds possessed the qualifications of an A1 rating, an analysis should be made to ascertain the investors' appraisal on that type of security outstanding of companies operating in the same industry and facing similar or comparable risks to those of the subject company. The figure so determined would then be used as the best indication of the cost of such class of capital.

BECAUSE of the substantial decline in interest rates over the past nine years, there is a common impression that all financing can be accomplished on a very low-cost basis today, but this impression is not wholly in accord with the facts. Investors are doing exactly the same thing today as they have done in years gone by; namely, appraising risks of different classes of capital to the best of their ability. This is shown very clearly in Table II on page 352.

These data show that public utility bond yields have declined in the last five years. They also show that they continue to vary according to the quality rating or the type of money that is being considered. It is obvious that any analysis of money rates must be predicated upon a quality classification rather than an over-all average. This has particular significance in a determination of return as will be discussed later. It explains why, in the preceding discussion (wherein a method was outlined to ascertain the cost of bond capital), emphasis was placed upon determining the investors' appraisal of risk of the same class or quality of security.

Turning attention to the preferred stock, the same procedure should be followed to ascertain the cost of this class of capital. If the 6 per cent par $100 preferred stock had been recently sold, the cost of such financing would be the most practical test. Here again consideration must be given to the offering price, underwriting commissions, other financing expenses to company, net price to company and sinking-fund requirements, to ascertain the effective cost of such capital. If no recent sale was made, the cost of such capital possibly can be determined from the relation of the prescribed rate for such capital to the average of the high and low quotations if the stock is traded and there is a reliable market.

IF this method cannot be used, cost of preferred capital must be determined by a study of the investors' appraisal of the risks of that class of capital; that is, an analysis should be made to ascertain the investors' appraisal of preferred stocks of similar quality of companies operating in the same industry and facing similar or comparable risks to those of the subject company. The figure so determined would then be used as the best indication of the cost of such class of capital. For purposes of this discussion it is assumed that such figure for the preferred stock of the subject company is 6.25 per cent.

Similarly, the common stock should be analyzed. If a recent sale has been made, this is the best test. A recent sale of common stock of a natural gas pipeline company was a block of 355,250 shares of Northern Natural Gas Company on September 10, 1941. This block was not sold by the company, but nevertheless the sale can be used just as effectively to ascertain the investors' appraisal of the risk of this class of

capital or, to state it differently, the earnings-price ratio demanded by the investors. The price to the public (a dividend had been declared), was $31.40 per share, the underwriting commissions were $2.35, the expenses to the seller were 32 cents, and the net price received by the seller was $28.73 per share. The earnings per share not adjusted for increased tax rates were $3.68 per share and adjusted for increased tax rates were $3.26 per share. The earnings price ratios, therefore, based upon the net price to the seller, were 12.81 per cent and 11.35 per cent respectively. If an actual sale of common stock of the subject company near the date of return determination had been made, the cost of such financing would be the criterion.

If no common stock financing had been recently undertaken, then the cost of capital could only be determined by an analysis of the earnings-price ratios computed upon the basis of the high and low quotations in relation to earnings available for equity if the stock was traded and there was a reliable market. If this method proves impracticable, then resort must be had to an analysis of the investors' appraisal of the risk of the same class of capital in similar companies operating in the same industry.

Such procedure for the common stock and equity of the subject company would involve an analysis of earnings-price ratios of natural gas pipeline company common stocks. The results of such analysis for the 5-year period, 1937-1941, are shown in Table III on the following page.

Table III contains data on all the natural gas pipe-line companies that have common stock held by the public and upon which market quotations can be secured. Moreover, they represent the entire industry, which is what the investor would survey before he made an investment. Here again, the figures cover a 5-year period which includes good years and bad years, peace years and war years. Yet, regardless of whether one looks at the simple averages or weighted averages, the variations in the 5-year period are less than one per cent. This indicates remarkable stability and proves that the investors were measuring risks rather than the abnormality of any particular year or figure. Furthermore, it indicates that the investors are appraising the risks of common stocks in natural gas pipe-line companies on the average at approximately 12 per cent. This

TABLE II

PUBLIC UTILITY BOND YIELDS BY QUALITY RATING—1937-1942

Quality	*Annual Average*					*June*
	1937	*1938*	*1939*	*1940*	*1941*	*1942*
	%	%	%	%	%	%
A1+	3.19	3.00	2.83	2.75	2.69	2.70
A1	3.50	3.25	3.06	2.93	2.81	2.92
A	3.93	3.88	3.64	3.32	2.99	3.01
B1+	4.77	4.84	4.41	4.06	3.45	3.45
B1	5.78	6.26	5.25	5.24	4.67	4.71
B	7.66	8.73	7.28	6.99	5.88	6.74

Source: Standard Trade & Securities—Statistical Section

TABLE III

EARNINGS-PRICE RATIOS
OF NATURAL GAS PIPE-LINE COMPANY COMMON STOCKS
1937-1941

Company	*1937* %	*1938* %	*1939* %	*1940* %	*1941* %
El Paso Natural Gas Company	13.80	14.06	10.59	11.05	12.37
Interstate Natural Gas Company ...	9.91	10.04	8.90	8.67	10.00
Memphis Natural Gas Company ...	16.70	16.18	15.85	15.82	16.08
Northern Natural Gas Company ...	N.A.	N.A.	N.A.	N.A.	11.55
Southern Natural Gas Company ...	N.A.	N.A.	21.60	20.13	14.73
Panhandle Eastern Pipe Line Company	N.A.	N.A.	9.60	13.54	11.46
*Simple Average	13.47	13.43	13.51	13.84	12.70
**Weighted Average	11.83	12.12	11.04	12.56	11.98

N.A.—Data not available to make computations.
* Assuming an equal dollar investment in each common stock.
** Assuming purchase of all common stock outstanding.

figure is accepted as a reliable measurement of the cost of common stock capital for the subject company.

ONCE having made these analyses, the various figures can be brought together and the return for the subject company (amount of dollars required to maintain credit position and allow for hazards of the business) can be determined as shown in Table IV on page 356.

Table IV indicates that the fair return is $5,407,500, which compares with the assumed actual earnings after taxes of $6,000,000. This would indicate that the actual earnings were too high and that a rate reduction was in order. However, such conclusion is more apparent than it is real, for it must be remembered that the actual earnings were reported on the tax rates which were applicable to such earnings, whereas under the present economic conditions it is clear that the succeeding year's tax rate will be higher. Certainly if a fair rate of return and a fair return are to be determined by the regulatory commissions, consideration must be given to the trend of tax rates.

To make the hypothetical illustration clearer, suppose that the $6,000,000 of actual earnings were for the full year 1941, giving effect to the 1941 tax rates, but that the hearings before the commission were being conducted during April and May of 1942. There was abundant evidence at this time that the tax rates for 1942 and succeeding years were to be much higher than the 1941 rates. Such evidence was based upon Secretary Morgenthau's speech of March 3, 1942, to the effect that "the new tax rates will be severe," and President Roosevelt's message to Congress on April 27, 1942, to the effect that "we must be taxed heavily and corporate profits should be kept at a reasonable rate—the word reasonable being defined as at a low level." Moreover, at this time the entire 1942 tax program was in the throes of discussion in Washington, as indicated by Table V on the next page.

THE proposed figures compare with the 1941 rates of 31 per cent and 72.40 per cent, respectively. The Federal excess profits and income taxes on these rates would have amounted to approximately $4,500,000 on a net taxable income figure of $10,500,000 (which gives the $6,000,000 of net income after taxes assumed above), but if the Treasury rates proposed for 1942 were applied to such figure the Federal excess profits and income taxes would total approximately $6,000,000, or an increase of $1,500,000. Giving effect to these increased taxes, or assuming that the company would report the same net taxable income in 1942 as in 1941, but had to pay the higher taxes, the net income after taxes would be approximately $4,500,000 in contrast to $6,000,000. The former figure would have fallen short of the required return just determined by $907,500 ($5,407,500 — $4,500,000). On this basis the ability of the company to reduce rates has been eliminated by the Treasury Department. As a matter of fact, it would indicate that the company was rapidly approaching the time when it would have to petition for a rate increase.

It may be argued that a reduction in gross revenue brought about by a reduction in customer rates will reduce net taxable income, which in turn will reduce the tax bill. Obviously, if the net earnings after taxes have already been determined to be at a level below the minimum required dollars to maintain credit position, as was the case in the above example, such argument cannot logically be made. On the other hand, if after applying increased tax rates, earnings available for capital are still in excess of the minimum required dollars to maintain credit position, then the argument has some force and it must be given consideration.

IN this emergency period, the Treasury Department is forced to collect as much in taxes as the traffic will bear. Commissions should take this factor into consideration when considering rate reductions. It is clear that under present conditions we cannot have one governmental agency reducing substantially a public utility company's gross revenue (with its resultant reduction in net earnings available for capital) and the Treasury Department taking the lion's share of the net tax-

TABLE V

COMPARISON OF VARIOUS 1942 TAX RATE PROPOSALS

	Rate of Earnings Below Excess Profits Tax Credit	*Rate in Top Excess Profits Tax Bracket*
Treasury Schedule	55%	88.75%
Joint Committee Schedule	40%	91.00%
*Ways and Means Committee	40%	94.00%

The figures in the first column are the sum of normal and surtax and represent the rate applicable to that part of earnings which is less than the excess profits tax credit. The figures in the second column represent the effective rate on that portion of earnings which falls in the top bracket (more than $500,000 above the EPT credit), allowing for excess profits, normal and surtax.

*This compares with latest proposal, 45 per cent and 87.50 per cent.

able income. Such a course would bring both management and the security holders into a squeezed position from which they could not extricate themselves and which ultimately would cause the service to suffer, with a consequent detriment to the customer.

In the Bluefield and other leading cases, the courts have repeatedly said that a rate may be too high at one time and too low at another time, depending upon conditions, and the latter must be fully considered in arriving at rate determination. Under this language, certainly conditions brought on by the emergency definitely should be considered by the commissions in fixing rates during this period.

If a commission ignores the dollar sum required to maintain a company's credit position, as determined by the direct approach described herein, which it is very likely to do in applying the classical approach and determining a low rate of return and a low rate base, the pernicious effect of such a procedure can very rapidly and severely impair the company's credit position. For example, if the commission in the case of the company described in this article should determine a fair rate of return of 6½ per cent, and a fair rate base of $67,000,000, the resultant return would be $4,355,000.

This is about $1,000,000 below the $5,407,500 determined as a fair return by the direct approach.

In this procedure lies a real danger. Since the net earnings available for capital are reduced, there is automatically a reduction in the quality of securities. In other words, this means an impairment of credit position, which not only affects the current operations of the company but places it in a position where it will be forced to pay more for money when it undertakes any new financing.

It has been assumed that the bonds of the subject company were sold on a cost basis of 2.90 per cent. It has been conceded that an active recent sale is the best test; but it must be realized that the reason the issue sold on such low-cost basis and carried such a high quality rating was that the bonds were so well protected with earnings. Now it is patent that if a return is to be determined which lowers the coverage and reduces the quality ratings, the bonds become less attractive to investors. As a result, they feel there is more risk and demand a higher return on their money. This means higher costs of capital to the company.

Thus it is obviously unsound to argue that the company has reached a position where it can finance very cheaply, and that future earnings need not be so high, for the very reason that the bonds did sell on a low-cost basis because the earnings were high. On the required earnings just determined by the direct approach of $5,407,500, interest charges of $870,000 would be covered over 6.20 times and the ratio of income available for fixed charges to the par value of fixed debt would be 18 per cent. The matter of coverage cannot be treated lightly, as demonstrated by the following recent developments in the banking field:

In the early part of 1939, the New York State Bankers Association took active steps to establish certain objective measurements of bond quality with the purpose of determining the relative suitability of individual bonds

TABLE IV
DOLLARS NECESSARY TO MAINTAIN
CREDIT POSITION (RETURN) OF SUBJECT COMPANY

Class of Capital	*Amount* $	*Rate* %	*Return* $
First Mortgage 3%—20-year Sinking-fund Bonds	30,000,000	2.90	870,000
6% Preferred $100 Par Stock	15,000,000	6.25	937,500
No-par Common & Equity	30,000,000	12.00	3,600,000
Total Capital	75,000,000		5,407,500

for inclusion in bank bond accounts. Just as the banker follows certain accepted practices in appraising normal credit risks, it was deemed appropriate that much the same procedure and methods could be applied to the investment of bank funds in corporate securities.

Essentially, the factors of analysis which were selected for various groups of bonds represented an attempt to reduce to the fewest and simplest fundamentals the statistical factors which appeared most pertinent in measuring the basic statistical strength underlying the funded obligations of corporate enterprises.

For each of the factors used, a suggested conservative ratio was selected to provide a standard against which the relative quality position of an individual bond could be tested.

In preparing these quality ratios an attempt was made to place them at levels where qualifying bonds would be expected to experience the greatest possible stability in price. Obviously, they were not offered as a standard below which banks should never go but rather as a guide to "money bonds." They provided a tool for measuring the relative degree of risk that must be assumed in the purchase or retention of any individual bond.

Naturally, it should be recognized that many additional ratios could have been computed to supplement those that were presented, and that there are many factors entering into the determination of bond quality which are not subject to definite statistical measurement or comparison. The approach, therefore, was not designed and could not be considered a substitute for complete bond analysis.

SPECIFIC ratios were presented for one representative segment of each of the four major groups of bonds; namely, public utilities, industrial, railroad, and municipalities. Following the close of these conferences, active research work was continued by Standard Statistics Company, Inc. (now Standard & Poor's Corporation) in collaboration with the Bond Portfolio Committee of the New York State Bankers Association toward the establishment of similar ratio tests covering all important bond groupings.

Since banks form a large segment of the capital market and through their advice to depositors, borrowers, and customers influence another large segment of the capital market, namely, the investors, the significance of the importance which they attach to ratio analysis and quality ratings cannot be

overlooked. In other words, if they give considerable weight to the quality of a bond and its rating (and it must be remembered that bond ratings have been in existence at least twenty-five years) any action taken by a regulatory body or governmental department which in effect reduces the quality of a bond makes it so much less attractive.

The coverage ratios worked out for the association for bonds of the natural gas companies to receive a quality rating of A or higher are shown below in Table VI. Using these ratios as a guide, it can be seen that the return of $5,407,500 provides for ratios which would allow the company's bonds to carry at least a strong A rating which would mean that the company could secure capital on a low-cost basis. On the other hand, if the commission determined the fair return to be $4,355,000, the interest charges coverage would be reduced to 5.00 times from 6.20 times, and the income available for fixed charges to par value of fixed debt would be about 14.50 per cent instead of 18.00 per cent. As the earnings coverage declines, the quality of the securities is lowered.

This factor of bond quality is of vital concern in determining the ability of any utility company to raise new capital and yet is often not clearly recognized. To illustrate, the yield rate of 2.90 per cent which was used to determine the minimum return requirements in the example would allow a market price for a 3 per cent, 20-year bond of $101.50. However, from figures on yields by quality ratings shown in a preceding table, it is evident that if the quality rating were to decline (because of lower earnings coverage or lower income available for fixed charges to par value of debt) to B1+, the price would decline to approximately $93.50 because the yield on such bonds was 3.45 per cent. And if the quality rating were to decline to B1 the price would drop to about $78 because the yield on such bonds was 4.71 per cent.

Furthermore, in this period of emergency, conditions are abnormal and radically different than in peace times. At present the Treasury Department is attempting to secure every dollar there is to help defray the cost of the war. The result is, as already shown, that

TABLE VI

IDEAL EARNINGS COVERAGE RATIOS FOR HIGH-GRADE (A GROUP) NATURAL GAS COMPANY BONDS

	*Fixed Charges Times-Earned	*Income Available For Fixed Charges To Par Value of Fixed Debt **
Retail Distributors	3.50	14.00%
Integrated	4.00	16.00
Pipe-line Wholesalers	4.00	16.00

*Average for the last six years with the latest year results at least as good as average.

**In recent years many bonds have been refunded with bonds carrying a low coupon rate. In such cases the fixed charges times earned ratio is not conclusive in and of itself. Consequently, the income available for fixed charges to par value of fixed debt ratio was constructed as an additional test.

the Treasury is reducing the net earnings available for stock capital in great slices, which automatically is reducing the earnings coverage of senior capital requirements.

At the same time the Federal Power Commission is working from the other end, namely, gross revenue, by making rate reductions, particularly in the natural gas industry, which reduce the earnings available for capital, with the same deleterious effect. It stands to reason that two different governmental agencies cannot continue to work independently of each other for unlike reasons, but for like results, without running a good chance of ruining the credit position of the companies involved. If this procedure continues, either the companies will have to petition for rate increases—and it would be wise for companies to be making studies in this direction now—or see their credit position ruined and their service to the public suffer.

It is repeated that the foregoing discussion is not, in any sense, an argument for the abandonment of the classical approach to rate determination in spite of its shortcomings. However, the criterion described herein could well be used to approach the problem from a different, and what seems to be a more practicable, angle. It would supply additional helpful information. It would serve as a check upon the final determination. It would bring all return studies to a more realistic basis.

It is true that the direct approach, as a theory of return determination, is young and has not been widely tested. But this fact should not condemn it but rather inspire wider application of its use.

From such experience might come a refined theory which would produce more satisfactory and equitable results than those which have been produced these many years by the Smyth *v.* Ames rule.

Utility Unity in War Time

"It took the war in its most brutal form of savage aerial bombardment to bring home to the British utilities the full possibility of joint coöperation between the various utilities. Demolition squads and fire-fighting squads of utility employees in Great Britain are organized and operated often without regard to the segregation of utility maintenance. The employees of a British electric undertaking pitched in and helped to put out fires on a gas holder or worked side by side with the employees of the British post office in safeguarding and rehabilitating electric and telephone facilities, respectively. American opportunities for joint collaboration between various utility companies in repair, maintenance, and precautionary measures are present."

—A. V. De Beech,
Chairman, foreign practice group, Electrical Equipment Committee, EEI.

OUT OF THE MAIL BAG

Associated Press Accurately Reported Air-line Order

YOUR July 30th issue contains an article by Selig Altschul which states that in reporting a May 14th announcement by the War Department "the press services and newspapers, for some reason, apparently failed to read the text of the War Department announcement and reported the Army as 'seizing' the air lines." Mr. Altschul also wrote:

"It must have been tough on the AP man who, when calling one of the air lines for information on revised schedules, was politely asked how could they have any schedules at all as his press service reported his line as going out of business."

... The Associated Press did not report that the government was "seizing" the air lines, nor did it say that the air lines were going out of business. What The Associated Press did report was that the government "was taking over actual operation or control of all domestic air lines planes," and then presented details of the War Department announcement.

This statement was based upon the War Department announcement, the text of which I am enclosing for your information. This announcement states that a substantial portion of available flight equipment "will be transferred outright to the Army air forces to be available for operation by Army personnel." The announcement further states that ships remaining in the service of the air lines "will until further notice continue to be owned and flown by the air lines, but will be considered always available for emergency military missions." In other words, they will be at the Army's call.

All of these quotations from the official announcement, and others in more detail, were reported by The Associated Press. There was no reference to any "seizure" which Mr. Altschul, by reason of singling out The Associated Press for specific mention, implies was reported by us.

—PAUL MILLER,
Chief of bureau, The Associated Press, Washington, D. C.

Explanation by Mr. Altschul

MY statement: "the press services and newspapers, for some reason, apparently failed, etc., . . ." did not refer to any specific newspaper or any particular news service. However, the fact remains that the Chicago papers (to use one example) which carried the misinformation on the alleged air-line "seizure," featured the AP credit line. The statement mentioned by Mr. Miller of the AP as coming from the War Department was at the bottom of the dispatch and somehow was in conflict with published headlines and lead material.

It is noteworthy that the Civil Aeronautics Board recognized the widespread nature of the erroneous news reports when it issued the following statement: ". . . the facts as stated make clear the error in press reports which announced that the operation of the air lines had been taken over by the War Department."

Now as to my further statement: "It must have been tough on the AP man . . ." This represents an actual colloquy and was reported to me by one of my air-line contacts. Frankly, I cannot disclose the name as to do so would be violating a confidence. This source must continue to live with this particular AP man and I do not wish to introduce any unnecessary complications.

—SELIG ALTSCHUL,
Chicago, Illinois.

¶ "WE *are fighting inflation to win the war. We are not fighting the war to stop inflation. America's program of inflation control must be geared to the maximum war effort and not the war effort to inflation control.*"

—BORIS SHISHKIN,
Economist, American Federation of Labor.

Wire and Wireless Communication

ALL radio requirements, civilian and military, were consolidated under the direction of the War Production Board Radio and Radar Branch of the Aircraft Production Division, it was recently announced. Formerly there were two groups that covered this field. The Radio and Radar Branch handled the military requirements, and the Radio Section of the Communications Branch handled civilian requirements. The latter section has been transferred to the Radio and Radar Branch and has been named the Civilian Radio Section.

Frank H. McIntosh, who was chief of the section under the Communications Branch, will continue to be chief under the Radio and Radar Branch. Ray C. Ellis, chief of the Radio and Radar Branch, will head the augmented group.

* * * *

THE War Production Board is studying a plan to curb the broadcasting hours of radio stations throughout the country as a means of saving vital materials. This despite some apparent opposition to the idea from James L. Fly, chairman of the Board of War Communications and the Federal Communications Commission.

Under the terms of the plan, offered by the War Production Board Communications Branch (prior to radio's shift to the Aircraft Production Division), every radio station in the country which broadcasts after 12 midnight would be ordered to cease at that hour. A number of key stations in major cities, however, would be given permission to keep a skeleton crew on hand throughout the night in the event of an emergency such as an air raid or enemy bombing.

The plan was studied somewhat critically by the Federal Communications Commission.

The moves recommended by WPB would save important metals such as steel and aluminum and some chemicals used in the manufacture of integral broadcasting parts. Most of these metals are already restricted in their use and broadcasting companies have experienced difficulty in making replacements.

The plan also calls for a number of smaller stations which are not making money to close for the duration. The plan, however, will assure these stations that their licenses will be waiting for them at the conclusion of the war. Under FCC regulations, stations that go off the air or do not operate a definite number of hours daily are liable to revocation of their licenses.

THE plan is expected to save enough materials to keep at least key radio stations on the air for the duration. It was understood that there are about 200 smaller firms which are not making a profit and which haven't made money for the past few years. In all likelihood these stations would be asked to stop and larger ones would be requested only to

curb the number of hours they operate.

Included in the recommendations by WPB is one calling for the FCC to make a study of national police radio systems with a view toward cutting overlapping and duplication. A WPB official declared that in many instances police radio systems could be cut down without stopping important work.

Commending broadcasters for "doing a marvelous job for the war effort," Chairman Fly expressed confidence that the radio industry's stability would be maintained despite shortage of tubes and other materials. Because of the industry's war work, he told a press conference, "I don't think anyone will sit by and permit broadcasting service to be impaired."

ALLUDING to a number of suggestions by government and industry officials for conservation of materials, Fly said:

> No measure has been suggested by anyone in the government or in the industry which is not aimed toward establishing stability and durability of broadcasting service and coverage.
>
> No suggestion has been made which would result in any real impairment of the service being rendered to the public by radio or of the service being rendered to advertisers.

Chairman Fly told his press conference that he was alarmed over the idea published in recent reports of a suggestion advanced within the War Production Board for a voluntary midnight radio "curfew" as "markedly out of order." Mr. Fly said a number of points have been raised for consideration from different sources, "but all of them are aimed along constructive lines."

* * * *

THE Federal Communications Commission, on August 11th, adopted an order requiring each and every common carrier by wire or radio to which this commission's accounting regulations (including those in force under the provisions of § 604(a) of the Communications Act of 1934, as amended) are applicable shall file with the FCC, under oath, not later than September 10, 1942, information regarding the identity of each responsible official, the instrument through which his responsibility was established, and whether he is responsible directly to the stockholders or to other groups of individuals. This action was done in order that the commission might learn who is to be responsible to it for application by the carrier of FCC rules on uniform accounting.

* * * *

AMERICAN Telephone and Telegraph Company directors have authorized for the eighty-sixth consecutive time the payment of the regular quarterly dividend of $2.25 a share. Some doubt had been expressed as to the ability of the company to maintain its annual $9 dividend rate in view of heavily increased taxes and higher operating costs.

It was noted that subsidiaries of the Bell system had reduced their dividends and this was taken as an indication that the parent company would do likewise. This view was reflected on the New York Stock Exchange when, just prior to the dividend meeting, the stock dropped from 119 to 116¾. After the announcement had been made that the customary dividend would be paid, AT&T closed at 119½.

But because the stockholders will get on October 15th the quarterly payment to which they have been accustomed, it by no means follows that they will get it for the subsequent quarter. By that time the new tax bill will have passed, and one official of the company has stated that at the rates now proposed the net income would be reduced by at least $4 a share.

Notwithstanding that the company is doing the greatest business in its history, the gains in gross revenues have been more than offset by higher taxes and greatly increased operating expenses. As a result net income is falling below that of last year. Subsequent dividend disbursements will necessarily have to be kept closely in line with actual earnings.

* * * *

DESPITE the fact it is engaged in a contract dispute with the Western Union Telegraph Company and Postal

Telegraph-Cable Company, the American Communications Association, an affiliate of the CIO, has pledged not to call a strike under any circumstances, J. P. Selly, president of the union, disclosed recently. Because of the move the union hopes to receive prompt action from the government in resolving the differences with the two companies.

The union has been seeking wage readjustments with Western Union covering 6,000 workers in the New York metropolitan district and a similar agreement with Postal Telegraph covering 15,000 workers throughout the country. The Western Union dispute was certified to the War Labor Board on August 21st by Frances Perkins, Secretary of Labor. Walter Mills, a Federal conciliator, is attempting to mediate the Postal Telegraph dispute.

THE union contends that the telegraph workers receive an average of $20 a week, compared to an average of $37.50 a week in other war industries.

Selly stated his union wanted to coöperate with the companies and the government in making the telegraph industry capable of carrying its war-time burden. As a result of plant deterioration and of workers leaving for better-paid war work vital communications have suffered, he said.

The union has put forth a 5-point "victory" program to be carried out with government financial aid. The plan calls for establishment of 20-minute service from sender to receiver, elimination of racing information, social messages, and all other traffic not vital to the war effort, rehabilitation of plant and equipment, introduction of a national program of labor recruiting and turnover, and raising of wages to a level approaching that prevailing in other industries.

* * * *

SECRETARY of Navy Frank Knox was reported on August 12th to have promised "immediate consideration" to a request from the American Communications Association, CIO affiliate, that commercial radio stations along the coasts of the United States be kept in operation for the protection of United States shipping.

Following a conference with Secretary Knox, Admiral Horne and Captains Redman, Webster, and Holden, all of the Navy Department, ACA representatives said they had offered to coöperate with the Navy in supplying highly skilled radio operators to man additional stations if the Navy would authorize their construction.

* * * *

HEARING of wage demands of approximately 5,500 plant, traffic, and commercial employees of the Ohio Bell Telephone Company was begun in Washington in mid-August at a closed session of a War Labor Board panel.

Wage increases of $4 to $5 a week were being asked by 1,900 maintenance, repair, and installation employees, who had staged a strike earlier in the month; 4,000 telephone operators; and 600 commercial, accounting, and directory employees.

The panel is composed of Federal Circuit Court Judge Charles Clark of New York, chairman and public representative; Gardner R. Withrow of the Brotherhood of Railroad Trainmen, employee representative; and William Hanes of New Orleans, employer representative.

* * * *

WESTERN Union and Postal Telegraph announced recently that on September 18th they would cancel the singing telegram, as well as all special-rate social and holiday greeting service, tourist and reservation services, and distribution by messenger of unaddressed circulars and samples.

In prewar days the companies offered these services to promote business and increase usefulness to the public, but the announcement said that the time has come when maintenance of the special services sometimes threatens to delay a growing volume of vital war and industrial messages.

Before the services actually are canceled, the companies must obtain ap-

proval of the Federal Communications Commission, but that will be a routine matter since it is known that the FCC favors the cancelations. Formal applications for FCC approval were filed by both companies.

* * * *

If theories advanced by some radio manufacturers are correct, it is probable that a fair proportion of merchant ship sinkings along the Atlantic coast have been unwittingly caused by members of the ships' crews themselves.

It is stated by these manufacturers that many types of radio receiving sets also send out, or broadcast, through the oscillations of tubes, signals of such strength that they may be picked up at distances of 100 miles or more. It is thus possible for the enemy submarine, lying in wait, to locate the merchant ship and then easily stalk its prey.

The Federal Communications Commission has forbidden use of such radio receivers on all American ships of 1,600 tons or more. Also, whenever found, personal radio receivers have been taken away from seamen as they boarded ship. Nevertheless it is believed that some crew members, probably believing the radio receiver ban was nothing but an example of red tape or unnecessary restriction, have smuggled small receivers on board. Then, listening to ordinary radio programs, they have unwittingly led an enemy submarine right to their ship and had it torpedoed under them.

If this is true, some method should be worked out to effectively keep all such radio receivers off the ships and some means of teaching all crew members the danger should be adopted.

* * * *

Telegraph service in the United States would improve if Western Union and Postal Telegraph companies merged, Ray C. Wakefield, member of the Federal Communications Commission, asserted in a speech before the American Bar Association at Detroit on August 26th.

A merger would also be a long stride toward making the United States the "communications center of the world," Wakefield said. "In the international field, merger is essential if we are to have a unified communications system sufficiently strong to compete for traffic with the carriers of other countries," he stated, adding:

> Our goal is an American-owned and an American-controlled communications empire. We hope that no substantial area or trade or political center shall be without the direct and instantaneous flow of communications with the United States. Merger is an integral part of this plan.

Wakefield said "Postal Telegraph is still operating today only because of huge loans from the Reconstruction Finance Corporation."

Citing Postal's operating loss against Western Union's net income "while serving the same area," Wakefield concluded that "a rate increase is obviously not the solution."

* * * *

Asserting that "messages announcing the results of horse races are receiving priority" while "even messages to General MacArthur" are being delayed, CIO President Philip Murray recently advocated a 5-point program "for the immediate conversion of the telegraph industry to meet the nation's war needs."

"The Communications industry threatens to become a serious bottleneck in war production and the public should know about it," Murray said.

The program, proposed by the American Communications Association (CIO), listed the following points in remedy:

"Service policies must be set on the standard of 20-minute service from sender to receiver; all traffic not vital to the war effort should be eliminated; labor recruiting to provide an adequate supply of personnel must be immediately undertaken. Wages must be raised from the present substandard levels to stabilize the industry, and the production program should be financed by the government."

The CIO head said that "Wall Street-inspired merger schemes are no solution to the present communications crisis."

Financial News and Comment

By OWEN ELY

Preferred Dividends versus Taxes

PRESIDENT Justin R. Whiting of Commonwealth & Southern, in a recent letter to stockholders, blamed the omission of the preferred dividends to proposed high Federal taxes, along with common dividend restrictions on subsidiaries which have refunded mortgage debts. Mr. Whiting described the company's position as follows:

> The heavy corporation taxes now proposed are in reality a tax on the stockholders themselves, collected at the source. To the extent that taxes cause reduction or elimination of dividends, they are in effect a tax on the stockholders of 100 per cent of the amount of such reduction irrespective of his income tax bracket and of his ability to pay. We will continue our efforts to bring to the attention of the authorities the inequity of the tax burden which the pending House bill would impose on the utility industry and its stockholders.
>
> The House bill imposes unjust tax burdens on investors in utility stocks, particularly preferred stocks with long-established dividend-paying records. We expect to do what we can to make the gravity of the matter apparent. Unless investors themselves become articulate and come out of their apparent lethargy their situation may not be fully realized.

Utility representatives who appeared before the Senate Finance Committee on the tax question included President Kellogg of the Edison Electric Institute, President Arkwright of Georgia Power Company, President Bird of Montana Power, Chairman McCarter of Public Service Corporation of New Jersey, and others. (See page 369 of this issue.)

TRUSLOW Hyde, Jr., statistician of Josephthal & Co., testified before the Senate committee regarding the advisability of exempting utility preferred dividends, and has presented his views to the FORTNIGHTLY, which we summarize as follows:

The unfair burden which the present system places on common stockholders is shown by the statements of Consolidated Edison of New York and Public Service Corporation, both of which have preferred dividend requirements of around $11,000,000. Since preferred stockholders have a contractual right to a fixed dividend and will not assume any part of the $5,000,000 normal and surtaxes which will have to be paid on the earnings distributed in the form of preferred dividends, the entire burden will fall on the common stockholders.

Utilities have long since abandoned hopes of common stock financing but, until recently, they had expected to be able to keep their debt at a conservative level through the use of preferred stocks. Now even this source of capital has been closed by the House tax bill.

On the strength of its 1936 earnings, Consumers Power sold 550,000 shares of $4.50 preferred stock in January, 1937, at 100¼. Earnings before taxes this year will be about double those of 1936; but, since the government proposes to take more than 60 per cent in the form of taxes, the protection for the preferred stock is impaired, as reflected in the present market price of 90. The company now needs additional capital to meet the increased demand for power from armament manufacturers. It cannot sell additional preferred stock, and must either omit common dividends (a 100 per cent tax on stockholders) or increase funded debt (contrary to SEC standards).

Virginia Public Service is already a casualty of the inequitable tax bill. Last year it proposed a recapitalization which conformed closely to SEC recommendations. This plan called for the sale of $22,800,000 3½ per cent first mortgage bonds, $5,700,000 3 per cent serial notes, and $7,000,000 5¼ per cent preferred stock. Because of prospective higher taxes this plan could not be carried out and a substitute was necessary. In the amended plan, the amount of first mortgage bonds and debentures was increased to $26,000,000 and $10,500,000, respectively, and the preferred stock was eliminated. The total debt of $36,500,000 thus became too heavy to qualify the new issues for high-grade investment purposes. The first mortgage bond, which carries a 3¾ per cent coupon, now sells at 104 compared with the offering price of 106¾, while the debentures sell fractionally under their offering price of 102, and have already sold under par, despite their relatively high coupon rate of 5 per cent.

Last year utilities paid preferred dividends of $132,000,000, which if deducted from taxable earnings would reduce the Treasury's revenues by less than $60,000,000 on the basis of the House bill. This would be a cheap price to pay to preserve the credit of the utilities and assure sufficient power for the production of armaments.

More Time Asked for National Light-Houston Exchange

NATIONAL Power & Light Company has been permitted by the SEC to extend the exchange offer of Houston Lighting common for National preferred (two shares for one, up to 90 per cent of holdings) for sixty days beyond August 14th.

The original offer was approved by the SEC December 24th and became effective January 30th. On June 15th an application to engage the services of three investment banking companies to facilitate the exchange was approved by the SEC, and on June 22nd about 300 investment banking firms and security dealers throughout the country began soliciting holders of the preferred stock. In the first four months, National had been able to dispose of only 108,712 shares of Houston common stock, or 21.94 per cent. No report has yet been issued regarding the further progress of the deal since the banking houses were brought into the picture.

Associated Gas & Electric Bonds

THE Associated Gas system still faces long delays in the completion of its reorganization. The recent SEC order to dispose of 116 scattered properties was a routine development, and apparently does not conflict with the trustees' plan to set up four systems as follows: (1) New York-northern Pennsylvania group; (2) eastern Pennsylvania-New Jersey group; (3) western Pennsylvania group; and (4) Florida-Georgia group.

Associated Gas & Electric Company debenture 5/50 are now selling at about 8 on the Curb, the range this year being 12½-7¾ and last year 19½-10. The company is the top holding company in the Associated system. It owns junior bonds and common stock of the Associated Gas & Electric Corporation, which in turn controls the several subholding companies, which own the equity interest (as well as some of the bonds) in the operating companies.

Legal proceedings were begun sometime ago (by a committee representing the Company bonds) to reopen the Hopson "Recap Plan" of 1933, at which time Associated Gas & Electric Company bonds became subordinate to Associated Gas & Electric Corporation bonds. If this litigation is successful, the Company bonds will be more on a parity with the Corporation bonds (although the latter may be allowed an additional claim for interest due to the reduction of coupon rates, etc., in the 1933 "recap"). Since the litigation may take some time to complete, a voluntary compromise has been proposed, and the trustees of both companies have been actively interested. Hearings are to be resumed this month

before the special master, Frederick E. Crane.

Associated Gas & Electric Corporation 4/78 are currently selling over the counter around 10. The difference of about two points between the Company bonds and the Corporation bonds reflects current market appraisal of the difference in status, and the likelihood that a compromise will be effected for readjustment of the "Recap Plan."

ASSOCIATED Gas & Electric Corporation consolidated income for six months ended June 30, 1942, (before deductions for expenses of the Corporation or trustees) was $4,555,201 compared with $6,103,672 last year. Federal income taxes were accrued at 40 per cent, except for one subsidiary which accrued at 45 per cent. Only small provision was made for excess profits taxes for 1941-42, as it was believed that, on a consolidated basis, there would be no liability. It is impossible to make exact adjustments for a 45 per cent tax rate as currently proposed in the House bill; however, if Federal taxes increase 10 per cent or $580,000, this might reduce first half net income to about $3,875,000, or at the rate of $7,750,000 per annum.

At the present time leading holding company common stocks are selling to average 6 times earnings. If Corporation and Company bonds should be converted into common stock of a new holding company, such stock might have a market valuation of about $46,500,000 (6 times $7,750,000). The aggregate market value of all Associated Gas & Electric Corporation and Associated Gas & Electric Company securities (excluding $5,000,000 trustees' certificates which could probably be retired in reorganization out of system cash) is estimated at $28,700,000. There might therefore be a potential appreciation of 62 per cent, based on this rule-of-thumb estimate.

If earnings improve in the post-war period as a result of lower taxes, refundings, etc., this estimate could be materially increased. Moreover, a number of system properties may eventually be sold to municipalities or power authorities at a substantially higher multiple of earnings than 6. Municipalities can afford to pay better-than-market prices because income taxes on earnings are eliminated, and they can also issue tax-free bonds. A number of such sales have been effected or are pending, including the proposed sale of the large South Carolina properties, but local political conditions sometimes interpose obstacles and delays.

An unfavorable factor might be the desire of the SEC to "earmark" future earnings from some operating subsidiaries retained in the system, for the purpose of building up surplus or adjusting capital ratios.

The system recently obtained a small "windfall," the SEC and the Federal court having approved a compromise settlement of claims against Howard Hopson and his associates for $2,073,710 cash and securities. However, some 90 companies will participate in the distribution.

Capital Transit Company

(*Second in a series of brief articles on traction companies.*)

CAPITAL Transit Company, which operates trolley and bus routes in the city of Washington and adjacent counties, is controlled by Washington Railway & Electric, affiliate of the North American Company system. The company was incorporated in 1933, succeeding Capital Traction Company. Fifty per cent of the capital stock is owned by Washington Railway & Electric and 1. per cent by North American Company and others of its subsidiaries. The accompanying table shows the record of earnings, dividends, and price range for 1935-41.

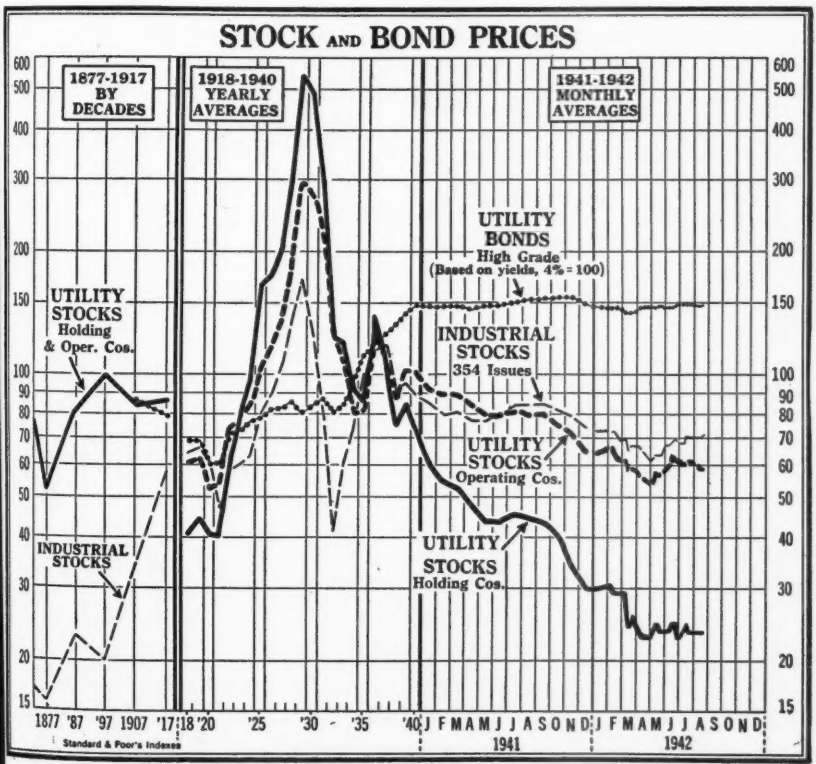
Year	*Earned Per Share*	*Dividends*	*Approximate Price Range*
1941	$5.45	$1.25	17—14
1940	3.60	1.00	18—12
1939	2.45	.50	16— 7
1938	1.07	...	9— 7
1937	.57	...	16— 7
1936	.12	...	17—12
1935	1.58	...	27—15

It is interesting to note that the price range last year was almost the same as in 1936, though earnings were 45 times as large.

In the first quarter of 1942 $1.32 a share was earned compared with 93 cents in the first quarter of 1941. (For the month of March, however, net income was substantially below 1941.) Dividends are being continued at the rate of 30 cents quarterly. (Last year they were at the rate of 25 cents but a year-end extra of the same amount was added.) The company was in sound current position on December 31st, with cash assets of over $3,000,000, which exceeded current liabilities. Capitalization consisted of $16,257,555 funded debt (made up of a number of items) and 240,000 shares of capital stock. Book value of the stock was about $125 a share (excluding a reserve for contingencies amounting to about $27 a share).

The company has been favored, of course, by its location in the national capital during a period of mushroom growth in population and activity. From June, 1940, to January, 1942, rush-hour traffic increased about 50 per cent and midday traffic about 25 per cent, although the number of trolleys and busses in operation increased only 37 per cent. (At the beginning of 1942 there were 722 street cars and 871 busses.) In addition to new equipment, the company has had to build new storage yards and garages, plant additions costing over $4,000,000 in 1941. Much of this was provided for out of earnings, funded debt increasing only $1,422,431 during the year.

The stock is currently selling around



21 to yield about 5.8 per cent. Selling at less than 4 times last year's earnings, this would seem to discount adequately the possible inroads of taxes on profits this year.

Corporation News

A PROTECTIVE committee has been formed for holders of *Long Island Lighting* preferred stock, headed by Benjamin F. Gray, of Gray, Scheiber & Co.

Columbia Gas & Electric's program for repurchasing $9,452,000 of its own bonds became operative August 10th; the company can buy bonds only on the Stock Exchange, placing each day's business with a different broker, and the program must end by November 17th. Announcement of the program naturally had a stimulating effect on prices.

North American Company, continuing to distribute one-fiftieth of a share of Detroit Edison quarterly as a dividend on its own stock, has reduced its holdings of Edison to 4.75 per cent of the total, thus disposing of the holding company relationship. North American is redeeming $2,000,000 more debenture 3¾s of 1954, reducing the amount to $42,325,000 compared with the original $70,000,000.

Middle West has appealed to the Federal Court of Appeals of the District of Columbia from the SEC "death sentence." The order called for dissolution of either Central & South West Utilities Company or American Public Service Company, reducing securities of both to a common stock basis; a voluntary plan to merge the two properties was rejected. This is the fourth case to be brought before the courts in recent months involving the constitutionality of § 11.

California Oregon Power (Standard Gas & Electric system) is to be reorganized under a plan recently approved by the SEC. The program provides for refunding $5,500,000 debentures due next October through sale of $3,500,000 new serial notes to insurance companies, the balance of the issue being "contributed" by Standard Gas, along with smaller amounts of the preferred stocks. However, Standard will benefit by the reorganization, according to the SEC, since net income applicable to the common stock (which it owns) will be increased $319,060, as compared with a loss of $242,692 interest and preferred dividends. (However, it might be noted that equity income may prove less valuable than income from senior securities, since only about half or two-thirds is usually available for dividend payments to the holding company.)

PUBLIC *Service of New Jersey* has been held a subsidiary of the United Corporation by the Third United States Circuit Court of Appeals, but the case may be appealed to the Supreme Court, since the company wishes to retain intrastate status.

Standard Oil of New Jersey proposes to combine its four natural gas properties into one new company, capitalized at $83,969,300, and distribute the shares to its own stockholders in the ratio of about one for ten. SEC hearings will start September 22nd.

The city of San Antonio has called for bids for a new issue of $33,950,000 electric power and light and gas distributing system bonds, proceeds to be used for acquiring the physical properties of *San Antonio Public Service Company.* The city has been involved in a controversy with the Guadalupe-Blanco Authority over the question as to which should buy the property; the move by the city to issue bonds has been taken to indicate that the legal difficulties interposed by the authority are being rapidly ironed out.

Public Service Coördinated Transport is being swamped with business due to war activities in New Jersey, tire shortages, etc. The company is carrying 43 per cent more passengers than a year ago and 60 per cent more than in 1940, and is still receiving requests for special service to new or old plants.

What Others Think

Utilities Make Out a Case On Taxes

So impressive was the recent showing of a number of utility spokesmen before the Senate Finance Committee that there is a good reason to believe that the committee will take some action looking toward the alleviation of oppressive tax proposals as contained in the bill passed by the House of Representatives.

What the private electric utility industry asked of Congress in the pending tax bill was summed up very simply by *The Wall Street Journal* when it observed that its spokesmen did not in fact seek "special relief" from taxes. The *Journal* stated editorially:

> All it is asking is that it be treated for purposes of taxation upon the general principles of equality with other industries and of proper accounting.

And, this newspaper added, "It is entitled to no less."

The principal showing for the private electric utility companies was made to the Senate Finance Committee on August 12th by President C. W. Kellogg of the Edison Electric Institute. He made four major recommendations:

First, that "excess profits," if taxed at all, should be calculated after deducting the taxes under the 1940 law.

Second, that one-half of the dividends paid should be deducted in computing gross income.

Third, that a stationary base should not be imposed on a growing industry.

Fourth, that a deduction for deferred maintenance should be permitted.

Senator Walter George, Senate Finance Committee chairman, concurred with Mr. Kellogg's major suggestions. Senator Taft of Ohio also said he was "most sympathetic" to the problems of the utility industry. He added that "there is necessity for revising the entire excess profits law."

PASSED in its present form, Thomas N. McCarter, chairman of the board of the Public Service Corporation of New Jersey, warned the committee, "It will be the beginning of the end of private operation of utilities."

In urging Senate consideration of the serious consequences which he envisioned to follow proposed methods in the bill, for taxing private utilities, Mr. McCarter said:

> I desire to call attention of the committee to a recent publication of the New York *Journal of Commerce*—a conservative financial newspaper—containing a compendium by leading economists from different parts of the country, all concurring in their statement that the proposed method of taxing utilities will prove disastrous and is likely to destroy the continuance of these companies in private operation.

Regulated as they are, Mr. McCarter pointed out, public utilities "practically can have no excess profits." He urged that if this industry cannot be altogether relieved from so-called excess profits taxes, the law should be restored to the old system under which normal and surtaxes could be deducted in computing excess profits income as provided in the 1940 Revenue Act. To the extent that there have been any abnormal increases in utility incomes, he continued, it may be proper to place a tax on such profits. He charged that the pending bill does not fulfill Secretary of Treasury Morgenthau's objectives, as explained in that Cabinet official's statement to the House Ways and Means Committee.

"A tax bill which absorbs excess prof-

its still leaves the corporate taxpayer with a sufficient margin of income for dividends and safety," Mr. McCarter pointed out. "On the other hand a tax which dips too deeply into the incomes of low-earning corporations may seriously affect their debt-paying capacity, if not their very existence."

HEADING the list of utility representatives opposing what were branded as "confiscatory rates" in the pending tax bill was Preston S. Arkwright, president of Georgia Power Company, who pointed out that the bill in its present form would seriously hinder the utilities' expansion program.

Expressing serious doubt "if the Securities and Exchange Commission would permit utilities to sell bonds for expansion, even if the public would buy them because of the slender margin of earnings over interest charges," he expressed doubt, furthermore, if SEC would permit utilities to sell any new issues of preferred stocks. He feared he might have "to leave Georgia," he said, if his company passed its preferred dividend after he had assured investors of the soundness of placing their funds into the company.

TVA, Mr. Arkwright pointed out, is the principal competitor of his company, and pays no taxes; which, he urged, should be considered by the committee in determining the taxes to be paid by companies similarly situated as Georgia Power Company.

The time will come, he predicted, when all government-owned utilities would be subject to tax. Meanwhile, he recalled, electric power prices are the only prices not raised for the war construction program.

The position of OPA as a factor in this situation was graphically stated by Mr. Arkwright:

> The OPA, while having no control over prices of the regulated utility services, will nevertheless intervene, as they have done in other cases, stating "the approval of an increase in utility rates because of increased Federal income taxes would be contrary to the intention of Congress, inflationary in character, and adversely affect the program and policies of OPA to stabilize prices."

A PROPOSAL was made by Clayton E. Kline, counsel, in behalf of Kansas Power & Light Company, that utilities be permitted to avoid bankruptcy by passing tax increases on to consumers in the form of a special war tax. If taxes to be levied on utilities are to be virtually confiscatory, he argued, some such system would be necessary since it would require a rate increase of $10 to offset every $1 increase of costs of taxes under an excess profits rate of 90 per cent.

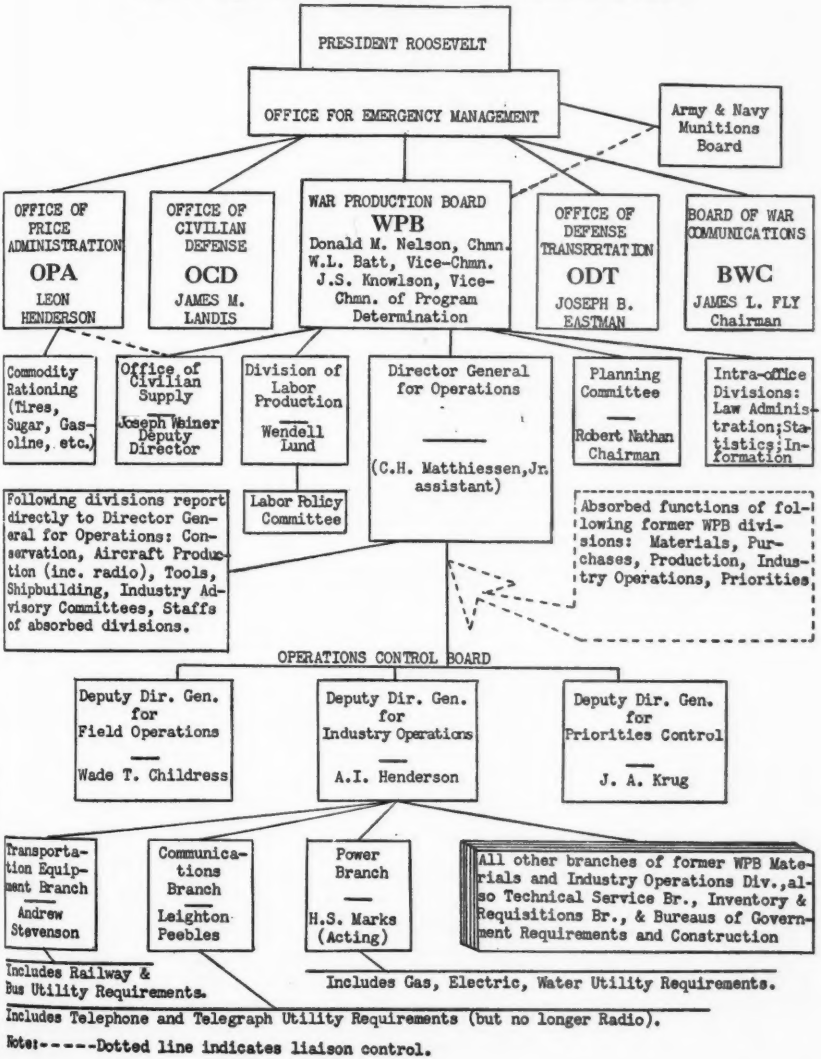
The contention that the utility industry is in a different situation from others because of regulation was also advanced by A. F. Dawson, president of Cincinnati Gas & Electric Company, who suggested that Senator George name a subcommittee to prepare a sound program of war taxes for public utilities. He characterized present proposals as "unsound, inequitable, and destructive."

The independent telephone companies were represented by Harold D. Bozell, who appeared on August 11th, on behalf of the USITA. He stressed the fact that the proposed increases in corporation taxes, particularly the increase in surtax to 21 per cent, are a crushing blow to corporations which cannot possibly increase their incomes to match taxes. This would, of course, include the closely regulated telephone industry.

Mr. Bozell continued with the following statement:

> Therefore, rather than suggest a modification of the present structure, may we suggest a redesign or a revision of the basic tax structure itself as it applies to corporations.
>
> The basic idea is one not new to you—namely, *tax the corporation as a vehicle* to reach the owners, the people who are doing business through the corporate form, but *do not tax the corporation as an entity.* To accomplish this, we suggest:
>
> 1. An income tax on corporations set a level judged to give the average return that would result if all the earnings of the corporation were distributed to its stockholders and such distributed earnings taxed as a part of their individual incomes—then apply the British system of giving credit to each stockholder for the tax paid on his behalf by the corporation.
>
> Naturally the advantage of using the

War Organization and the Public Utilities



Courtesy PUR Executive Information Service

corporate machinery to collect the tax on business done through corporations should be used, and it would have to be used to be sure to get the tax on earnings not distributed to security holders.

The present system of taxing people who are doing business through the corporate form results in unjust discrimination against these people as compared with those who do business through partnerships, individual enterprises, and other forms. This discrimination may even go so far as to take from these people 100 per cent of their income from such business if the tax burden on corporations is so high that such corporations are forced to discontinue paying any dividends to their stockholders. Such discrimination should be eliminated by creating a different tax structure.

2. An excess profits tax on all business whether corporate, partnership, or individual on profits resulting from the war effort. In devising this tax it is extremely important there be a true measure of what really constitutes excess profits. We believe that such excess profits are not real excess profits until after the deduction of all expenses, including normal income taxes and surtaxes.

As an alternative, Mr. Bozell suggested the following changes in the present bill before the Senate:

(1) Allow a corporation a credit against net income, for purposes of normal taxes and surtaxes, for all dividends distributed.

(2) Restore the original and correct deduction of the normal tax and the surtax from income subject to excess profits tax in place of the present deduction of excess profits tax in computing the normal tax.

(3) Allow a flat credit of 8 per cent on all invested capital, irrespective of amount, in computing income subject to excess profits taxes.

Harry C. Gretz, assistant comptroller of the American Telephone and Telegraph Company, appeared on behalf of the Bell system. The principal significance of Mr. Gretz' testimony was the fact that he demonstrated so clearly the burden which would be placed on telephone companies and employers generally by the so-called "withholding" provisions of the bill passed by the House. These are the provisions for withholding from wages.

Mr. Gretz found them to be such a complicated payroll deduction that the bookkeeping costs alone would partially outweigh the revenue advantages to be derived therefrom. In its place, Mr. Gretz suggested a simplified plan for fixing the amount of withholding tax, which would be more in line with other payroll deductions.

The Senate committee was so impressed with the force of Mr. Gretz' testimony that Senator George virtually gave notice that a subcommittee would do something about Mr. Gretz' proposal without delay.

Going back to the presentation of the electric companies, Senator George indicated his approval of Mr. Kellogg's suggestion that the tax bill "provide an allowance for an expanding industry with a large investment per dollar of sales in order to alleviate the hardship arising from the use of a stationary base period in determining what constitutes excess profits." Senator George said:

> If this constant increase in earnings is peculiar to the utilities industry it might be used as a fair basis for computation of excess profits through a simple amendment similar to the present growth formula.

Senator George also appeared favorably impressed with Mr. Kellogg's suggestion that some allowance be given for deferred maintenance in cases where maintenance is needed, but is handicapped by current shortages in both material and man power.

¶ "The *mere presence of war emergency does not in itself constitute any premise for denial of a fair return to a utility, however politically unpopular the latter may have been.*"

—Editorial Statement,
Public Utilities Association (of West Virginia) Reporter.

"WPB OR NO WPB, THAT LAMP STAYS LIGHTED, YOUNG MAN"

The Washington Plan Trembles In the Balance

For years the so-called Washington Plan has been looked upon as one of the most original and successful experiments in quasi automatic regulation of public utility rates. It takes its name from the city of Washington, where it was established in 1924 as the result of an agreement between the District of Columbia Public Utilities Commission and the Potomac Electric Power Company.

Essentially, the plan consists of a sliding-scale arrangement for annual adjustment of rates, to reflect profit sharing (or deficit sharing, below an agreed rate of return) between the utility company and its customers. In other words, the utility customers, under this plan, take their share of the excess profits, if any, in the form of rate reductions. But if the profits fall below the agreed rate of return, the customers must contribute a proportionate share in the form of an upward adjustment of rates.

However, since the original plan was installed in 1924, there has, so far, been no occasion for the Potomac Electric Power Company to invoke the provisions

of the plan which would call for *increasing* the rates. On the contrary, for seventeen consecutive years, electric rates in the District of Columbia have been reduced under the provisions of the plan, until today they are among the lowest in the United States. And the history of regulation in the nation's capital during that period has been more or less peaceful, especially in contrast with events elsewhere.

DURING the depression, there was some alteration of the plan to give the public a somewhat larger share of profits in excess of the agreed rate of return. This was in harmony with the downward trend in utility rate of return generally prevailing during that period. The change was agreed to by the electric company after negotiations with the District of Columbia Public Utilities Commission.

Aside from this deviation, the plan has apparently worked very well—both for the customers and for the company, which is among the soundest utilities in the United States. Students of regulation analyzed and wrote about the plan. Even foreign governments became interested in it. It was hailed in some quarters as a solution to the problem of utility regulation which has become so controversial in the United States during the last decade and a half.

Skeptics, however, raised two objections to the suggestion that The Plan was, in truth, a regulatory panacea:

(1) The plan depends upon an agreed rate base—meaning a frozen valuation (subject to adjustments for additions, betterments, and retirements). It was contended that while District of Columbia authorities were able to get together without further litigation with the utility company on a rate base for the Washington Plan, such a fortunate development could hardly be expected elsewhere, or as a matter of general practice.

(2) The plan is naturally popular as long as it results in reduced rates. If the company makes money, then the customers profit accordingly. But will the plan be able to hold its own during a period of rising operating costs, when provisions for higher rates will have to be invoked?

THE first of these objections was answered to some extent in 1935 right in the District of Columbia. During that period the Washington Plan was extended to gas rates. (In the nation's capital, gas and electric services are rendered by entirely different and unaffiliated companies.) The Washington Gas Light Company was able to get together with the District of Columbia Public Utilities Commission and agree on a rate base without further litigation. Friends of the plan began to argue that if it could happen twice in the same place, it could happen elsewhere—if regulatory authorities and public utility companies really made a sincere effort to establish the plan.

And now the second objection has put in its appearance and awaits an answer. Rising operating expenses indicate that under the provisions of the Washington Plan there will be no electric rate reduction in the District of Columbia for the first time since 1924—and possibly an increase. As to the gas rates, indications are even more definite that a rate increase is required—also for the first time since the gas rate plan was installed in 1935.

EARLIER this year, the regulatory situation in the District of Columbia became complicated by an internal dispute within the District of Columbia utilities commission. All of the three members are appointees of President Roosevelt. But Gregory Hankin, until recently chairman of the board, appeared to be skeptical about the propriety and desirability of the Washington Plan. At any rate, he gave notice to both the gas and electric companies that he was in favor of a general reëxamination of some of the fundamental aspects of the plan —notably, the introduction of the original cost theory of valuation.

Obviously, if the agreed rate base were thus torn open for dispute, the entire plan

would totter. But there were also indications that Chairman Hankin's two colleagues, Engineering Commissioner Charles W. Kutz and Commissioner James H. Flanagan, did not share his suspicions of the Washington Plan, as practiced.

Indeed, the Washington Plan wasn't the only point of disagreement between Chairman Hankin and his colleagues. Chairman Hankin sponsored a rather complicated program for rezoning Washington taxicab fares, which so angered the District of Columbia cab drivers that they went out on a strike—or "holiday," as they preferred to call it.

The District of Columbia Committee of the House of Representatives interfered at this point and the District of Columbia Public Utilities Commission had to back down, to some extent—thereby setting the unique precedent of the first successful strike on record against regulatory authority.

During this taxicab controversy, differences between Chairman Hankin and the other two commissioners increased. The climax came in August, when Chairman Hankin was displaced as head of the commission by the votes of his two colleagues. Commissioner Flanagan succeeded him as chairman, effective September 1st.

But before he stepped down, Chairman Hankin was overruled in his effort to broaden the scope of the annual hearing on gas rates, so as to take in such a fundamental issue as original cost valuation. However, the two other commissioners agreed that such a general investigation might properly be undertaken as a separate proceeding. Whether the District of Columbia commission will now embark on such a course of action remains to be seen, and the fate of the Washington Plan as it applies to gas rates may be decided accordingly. The same may also be said with respect to the electric rate question, which still remains to be determined by the commission.

IN a sense the war emergency has created a real test of the Washington Plan. If it is to be a one-way proposition—something that works only when the utility is making profits which can be partially turned back into rate reductions—then the plan is a fair weather device with more flash than equity. However, on the other hand, if the District of Columbia commission decides to abide by the plan even though it means increased utility rates, the plan will have shown that it is fair as well as simple.

But perhaps during a war emergency, the answer isn't as easy as that. The Office of Price Administration intervened in the Washington gas rate hearings and suggested that gas rate increases should be held up regardless of the provisions of the plan, because of a more important national objective: curbing inflationary spirals in prices which affect the cost of living.

The Washington Post editorially appraised the situation on the following lines:

> Ordinarily, of course, there would be no question as to the adjustment of rates in accord with the sliding-scale formula. From 1935 to 1940 that formula brought about lower rates every year. In 1941 there was no change. This year higher wages, fuel costs, and taxes appear to have cut the return to the Washington Gas Light Company to slightly more than 5 per cent. So under its agreement with the Public Utilities Commission it is clearly entitled to higher rates, though the proper amount of the increase is still in dispute. Should the PUC block operation of the sliding-scale the first time that it has called for higher instead of lower rates, it would probably be charged with acting in bad faith.
>
> On the other hand, the war has forced many changes in public and private obligations. Prior understandings cannot be permitted to stand if they seriously hamper the war effort. The sliding-scale agreement itself, moreover, clearly recognizes the necessity of flexibility. "To endure," that document reads, "it must be susceptible of such modifications both as to substance and form as the facts or conditions from time to time may require." Probably this clause could be used to justify some modification of the sliding scale for the duration if the administration were adhering to a rigid policy of holding down prices and costs of production.
>
> The weakness of the OPA's intervention in this case is that prices and production costs have not been effectively held in check. OPA officials are frantically trying to stem a tide that is already sweeping onward. Of

course, this tide of higher prices must be stopped somewhere if disastrous inflation is to be avoided. But it would not be reasonable to halt the operation of a sliding scale designed to maintain a reasonable balance between rates and prices so long as the expenses that a utility must meet are permitted to soar. This case is a dilemma for the PUC largely because the administration has not yet faced up to the problem of comprehensive stabilization that might prove unpopular among some strong political groups.

THUS, the question of raising gas rates in Washington taxes the ingenuity of the local commission, because it involves a basic conflict of public interest.

The commission must decide whether a sliding scale for rates shall be allowed to go up as well as down, as originally intended. The commission must also decide whether the plan should be set aside during a war period in the interests of keeping prices down or checking inflation. It is no easy decision, but admirers of the Washington Plan really hope some way will be found—by compromise, if necessary—to keep the plan afloat until the complications of war are out of the way. This would give the plan a clear opportunity to survive on its own merits.

—F. X. W.

WPB Announces Restrictions on Power Plant Expansions

THE War Production Board announced today the issuance of a series of orders to effect a readjustment of the power expansion program.

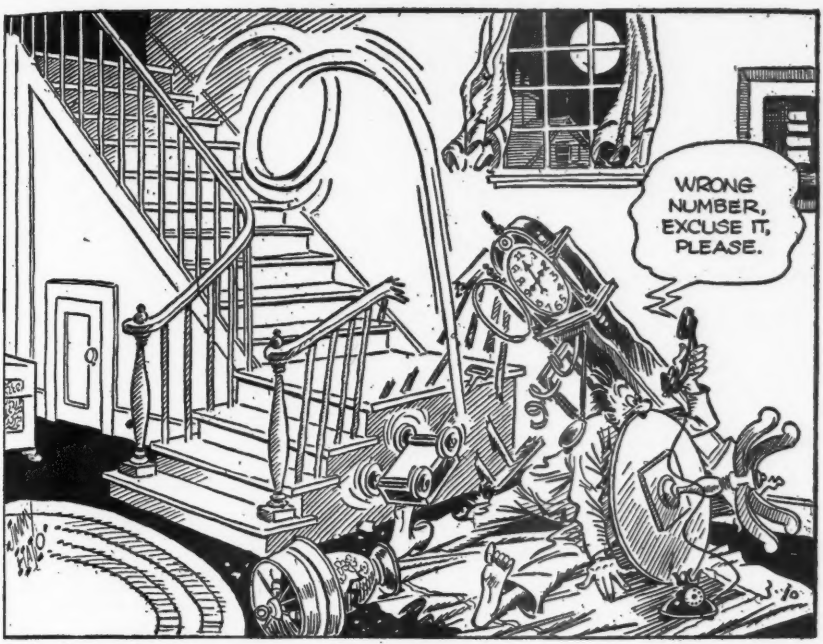
The orders involve extensive revision of existing priority ratings on public and private power projects throughout the country. All utility projects which are regarded as urgently necessary in the war program have been assigned higher priorities in order to assure their completion on schedule. In the case of the remaining projects, action has been taken so that they will not compete with immediate military requirements for critical materials and equipment, particularly equipment needed for the Navy and merchant ship programs, and copper and steel. This has meant the halting of some projects and continuance of another group only to the extent possible on low ratings. (See list on pages 378, 379.)

The decisions are the result of a comprehensive review of the electric utility construction program in the light of the power supply and requirements situation. This review, recently completed, has been under way since the late spring, in line with a general policy of proceeding only with such heavy construction as is indispensable to the immediate war program.

In the program of projects to be assured completion, 5,500,000 kilowatts of new capacity are provided for the remainder of 1942, 1943, and—to a limited extent—early in 1944. Of this amount, 3,400,000 kilowatts are private and 2,100,000 kilowatts public.

WORK on projects totaling 2,200,000 kilowatts, scheduled for operation in 1943 and 1944, is being stopped. Of this amount, 355,000 kilowatts represent capacity on which priorities are being suspended subject to reinstatement in the future should changing power requirements dictate such action.

In addition, projects totaling 1,890,000 kilowatts, scheduled for installation in 1943, 1944, and 1945 and authorized by the Congress as part of the program for Federal generating projects, are being reduced to low ratings, or are being held to their present low-rated or nonrated status. Work on the low-rated projects is permitted to continue but only to the extent that it does not compete for critical materials and equipment needed for direct war uses. For the most part, these Federal projects are hydroelectric developments on which, unlike steam plants, some construction operations can be carried on without requiring critical materials. The work done under the low



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ratings will facilitate expediting these Federal projects later, if necessary.

In conjunction with existing power installations, the projects which have been given the higher priorities are designed to assure supply for war and indirect war production as now planned with a small margin of capacity to provide for possible additional war production not included in the munitions program as now projected. It has been necessary to hold this margin to the minimum and the risks involved in such action represent the price that must be paid.

BECAUSE such a large part of the war program is now definitely planned for, it is feasible to plan for the electric capacity with more precision than has heretofore been possible. At the same time, it was emphasized that the reduction in the utility expansion program has substantially enhanced the probability of widespread curtailment in the use of electricity for civilian purposes, especially during 1943 and thereafter. It was explained that the necessity for diverting critical materials and equipment to the direct war program makes it impossible to carry out a utility expansion program that would preserve the standards of reliability of service observed in peace times; that civilian inconvenience and sacrifice must be expected, particularly during periods of drought or other adverse weather conditions, or in the event of serious accidents affecting utility systems, or in case of unexpected large increases in power requirements for war production.

The Federal projects and the projects on which priorities are being suspended are designed to provide a margin of potential source of power supply that can be brought into operation speedily to relieve later power deficiencies. A close check is being maintained continuously by the War Production Board on power supply and requirements in order that action may be taken as promptly as possible to reinstate or speed up these projects or initiate new ones as need arises.

PROJECTS HALTED OR SUSPENDED, IN WHOLE OR IN PART

Company or Authority	*Plant or Location*
Albuquerque Gas & Electric Co.	Albuquerque, N. M.
Austin, City of	Austin, Minn.
Bellefontaine, City of	Bellefontaine, Ohio
Benton, City of	Benton, Ark.
Berea, City of	Berea, Ohio
Boston Edison Co.	Mystic #2
Central Illinois Electric & Gas Co.	Rockford
Central Illinois Public Service Co.	Meredosia
Central Maine Power Co.	Wiscasset
Clarksdale, City of	Clarksdale, Miss.
Colorado Springs, City of	Colorado Springs, Colo.
Columbus & Southern Ohio Elec. Co.	Picway
	Walnut Street
Commonwealth Edison Co.	Fisk #18
Connecticut Light & Power Co.	Devon
Consolidated Edison Co.	Hell Gate
Consumers Power Co.	Weadock
Dallas Power & Light Co.	Mountain Creek
Dayton Power & Light Co.	Millers Ford
Des Moines Electric Light Co.	Des Moines
Ephrata, Borough of	Ephrata, Pa.
Fairmont, City of	Fairmont, Minn.
Farmers Electric Generating Corp.	Gilmer, Tex.
Flora, City of	Flora, Ill.
Florida Power Corp.	St. Petersburg
Ft. Dodge Gas & Electric Co.	Ft. Dodge, Iowa
Glendale, City of	Glendale
Gulf Power Co.	Pensacola
Gunnison, Town of	Gunnison, Colo.
Hinsdale, Village of	Hinsdale, Ill.
Illinois-Iowa Power Co.	Peoria
Illinois Northern Utilities Co.	Dixon
Iowa Electric Light & Power Co.	Marshalltown
Iowa Electric Light & Power Co.	Boone
Iowa Public Service Co.	Sheldon, Iowa
Jersey Central Power & Light Co.	Raritan River
Jones Onslow Electric Membership	Jacksonville, N. C.
Kansas City, Kansas	Quindaro
Kansas City Power & Light Co., Mo.	Grand Avenue
Kentucky Utilities	Tyrone
Los Angeles, City of	Harbor
Los Angeles, City of	Harbor
Lynn Gas & Electric Co.	Broad Street
Marshfield, City of	Marshfield, Wis.
Metropolitan Edison Co.	Middletown, Pa.
Mississippi Power Co.	Hattiesburg
Missouri Power & Light Co.	Mexico, Mo.
Monroe, City of	Monroe, La.
Montaup Electric Co.	Somerset
Murray City	Murray City, Utah
Narragansett Electric Co.	Westerly
New Hampshire Gas & Electric Co.	Portsmouth
New Jersey Power & Light Co.	Gilbert
Northwestern Public Service Co.	Aberdeen, S. D.
Ohio Edison Co.	Toronto, Ohio
Ohio Power Co.	Tidd
Ohio River Power Co.	Dilles Bottom
Pacific Gas & Electric Co.	Midway

Pacific Gas & Electric Co.	(Indefinite)
Pennsylvania Power & Light Co.	Williamsport
Philadelphia Electric Co.	Southwark
Potomac Electric Power Co.	Buzzard Point #6
Princeton, City of	Princeton, Ill.
Produce Terminal Corp.	Chicago, Ill.
Public Service Co. of Indiana	Edwardsport
Public Service of New Hampshire	Manchester
Public Service of Oklahoma	Tulsa
Reading, City of	Reading, Ohio
Richmond, City of	Richmond, Ind.
San Antonio Public Service Co.	Station B
San Diego Gas & Electric Co.	Silver Gate
Southern Indiana Gas & Electric Co.	Ohio River Station
Southern Indiana Power Co.	Rushville, Ind.
Springfield Gas & Electric Co.	Springfield, Mo.
Southwestern Gas & Electric Co.	Caddo Lake
St. Joseph Ry., Lt. Ht. & Pr. Co.	Lake Road
Tacoma, City of	Alder #1, #2
Tampa Electric Co.	W. Jackson Street
Tarentum, Borough of	Tarentum, Pa.
Traverse City, City of	Traverse City, Mich.
Union Electric Co.	Venice #2, Unit #4
United Illuminating Co.	Steel Point
Virginia Electric & Power Co.	Norfolk
Windom, City of	Windom, Minn.
Wisconsin Hydro Electric Co.	Clear Lake, Wis.
Wisconsin Power & Light Co.	Beloit

GOVERNMENT PROJECTS PROCEEDING ON LOW PRIORITIES OR UNRATED

Agency	*Plant*	*Location*
Tennessee Valley	Wilson #15, #16	Alabama
	Watts Bar #4 (steam)	Tennessee
	Pickwick #5	Tennessee
	Ft. Loudon #3, #4	Tennessee
	Guntersville #4	Alabama
	Chickamauga #4	Tennessee
	Wautaga #1, #2	Tennessee
	Wheeler #5, #6	Alabama
	South Holston #1, #2	Tennessee
	Wilson (steam)	Alabama
	Fontana #3	North Carolina
	Kentucky #3, #4, #5	Kentucky
U. S. Engineers	Bluestone	West Virginia
	Markham Ferry	Oklahoma
	Wolf Creek	Kentucky
	Center Hill	Tennessee
	Allatoona	Georgia
	Norfolk #2	Arkansas
	Fort Peck #2	Montana
	Fort Gibson	Oklahoma
	Denison #2	Texas-Oklahoma
U. S. Bureau of Reclamation	Colorado-Big Thompson	Colorado
	Anderson Ranch	Idaho
	Keswick #3	California
	Davis #1, #2, #3, #4, #5	Arizona-Nevada
Federal Works Agency	Pensacola	Oklahoma
	High Point	North Carolina
Bonneville Administration	Grand Coulee #7, #8, #9	Washington

(Numbers designate generator units in hydroelectric developments.

The March of Events

Fluorescent Development Questioned

Two prominent electric manufacturers and more than 100 public utility companies were alleged on August 18th by John W. Walker, Justice Department attorney, to have helped retard the development of fluorescent lighting throughout the country because it consumes less than the current required for incandescent lighting.

Mr. Walker, member of the antitrust division, charged before the Senate committee investigating patents that as a result of the companies' actions the lighting and power bills of customers in homes and industries were held at higher levels, while a conservation of electrical energy which would aid the war production program materially was blocked. Mr. Walker overlooked or ignored the fact that his charge had become somewhat moot in the light of recent developments.

Operating electric utilities are everywhere striving to induce their customers to take every step leading to economy in consumption because of war demands for power. The production of fluorescent equipment for sale to civilians, on the other hand, has been stopped by WPB restrictions. Thus, because of the "dated" nature of the Justice Department's complaint, it was doubted by Washington observers if serious action would ever be taken to commence antitrust prosecution, now blocked by Army and Navy requirements.

Mr. Walker testified that the principal factor that made it impossible for the manufacturers and the utilities to completely retard and control the development of the fluorescent lighting industry was the promotion of fluorescent lighting by an "independent" manufacturer, the Hygrade Sylvania Corporation. On the other hand, the pending patent litigation on fluorescent equipment involving this company was regarded in other quarters as the possible basis for continued discussion of the problem.

Although the War and Navy departments caused an indefinite postponement of a government suit against the companies, charging restraint of trade and foreign commerce, on the ground that war production might be disrupted, Mr. Walker said, no attempt had been made to interfere with a suit instituted against the Hygrade Corporation under certain fluorescent lamp patents.

WPB Curbs Artificial Gas Use

The War Production Board clamped restrictions, effective September 1st, on delivery of artificial gas to new industrial and household consumers, in acting to head off shortages expected this winter when gas will come into increased demand because of the fuel oil shortage. Herbert S. Marks, acting chief of the WPB Power Branch, pointed out that the oil shortage affects gas demand in two ways: First, producers of gas use oil in substantial quantities; second, many persons with oil burners are converting to gas space heating "in the erroneous belief that while oil will be scarce, gas will be plentiful."

The WPB order (L-174) provided that after September 1st no manufactured gas may be delivered to a nonresidential consumer for the operation of any gas-fired equipment which was not operated either by the consumer or on the same premises prior to that date, unless (1) the capacity of the new equipment is less than 150 cubic feet per hour, or (2) the new equipment replaces existing gas-fuel equipment of the same or greater capacity, or (3) the WPB grants approval for the delivery of gas for the new equipment.

After September 1st no gas may be delivered for space heating, such as heating a home, store, office, or factory unless:

1. The equipment was installed prior to September 1st. If the equipment was converted from some other fuel to gas, the conversion must have been completed by September 1st.

2. The equipment replaces gas fuel equipment of the same or greater capacity.

3. In the case of a new building, deliveries may be made to gas equipment installed prior to November 15, 1942, provided such gas equipment was specified in the construction contract and the foundation of the structure was completed prior to September 1st.

SEC Reorganization

A reorganization of the internal set-up of the Securities and Exchange Commission offices was announced last month, effective immediately. It was explained by Ganson Purcell, chairman of the commission, that the reorganization was in the interest of efficiency, economy, and flexibility. Elimination of 93 positions in three divisions, which were to be consolidated into other divisions, will entail a

savings of approximately $300,000 a year, according to unofficial estimates.

This saving in salaries—although there will be increases in a limited number of cases—is expected to enable the commission to live within its budget which has been cut about 10 per cent, or around $500,000, the yearly appropriations having been in the neighborhood of $5,000,000 annually.

Under the reorganization, the present six divisions—public utilities, trading and exchange, registration, reorganization, investment company, and general counsel—will be reduced to three: public utilities, trading and exchange, and a new division, corporation finance. The functions and personnel of the reorganization division and of the investment company section of the investment company division are to be combined with the existing personnel of the present registration division to form the new corporation finance division.

The remaining portion of the investment company division—the investment advisers section—is being combined with the trading and exchange division. A portion of the investigative and interpretive staff of the legal division will be assigned to the counsel's office of the new division. The remainder of the legal division will be assigned to a newly created office of solicitor and to the new opinion-writing office.

Rainfall Contributes to War Work

GOVERNMENT power experts estimated recently that rainfall had contributed about $100,000,000 to the country's war effort in the past few weeks. The Geological Survey reported that, in contrast with the drought which threatened the output of aluminum for fighting planes a year ago, especially in the Southeast, heavy rains had filled many of the great hydro reservoirs to overflowing.

In one night "at least $1,000,000 worth of rain in terms of power has fallen in the Tennessee valley alone," a power official said.

The Geological Survey said the water artificially stored to produce hydroelectric power "exceeds that of one year ago and also exceeds the amount normally available on July 31st," and in some parts of the Southeast water in power reservoirs is three times the volume of a year ago.

Hydro plants now account for about a third of the country's power production.

Grand River Line Is Opened

POWER to the government's new aluminum plant at Lake Catherine, Arkansas, was turned on August 21st, the Office of War Information announced, over a 195-mile line of the Ark-La Electric Coöperative from the Grand River dam in Oklahoma.

The line was built by an association of Arkansas and Louisiana electric coöperatives with supervision and financing by the Rural Electrification Administration.

"When the aluminum plant began operation," said REA Administrator Harry Slattery, "Arkansas bauxite was reduced to aluminum in Arkansas for the first time in the history of the state. The people's power resources now are playing an important rôle in that process, and the thousands of Arkansas and Louisiana farmers who make up the Ark-La Electric Coöperative can view with pride a significant contribution to the war.

"Because of their regional importance, the aluminum plant and the electric power serving it are of common interest to the people of Arkansas, Louisiana, Missouri, and Oklahoma."

Slattery said that the Ark-La line and lines similar to it were built to provide service to industrial and military establishments in rural areas in which previously existing facilities were inadequate to meet war power needs.

Alabama

Would Submit Purchase to Voters

COUNTY Commissioner Henry W. Sweet announced in a prepared statement last month that he advocated submission of the Birmingham Electric Company purchase question to a vote of the entire county and added that he would be governed by the result. His statement read in part as follows:

"The matter of purchasing the Birmingham Electric Company is possibly the most important proposition that has come before a local governing body in many years. It is by far the most important proposition that I, as an official of this county, have had to consider. On questions of ordinary importance, I do not hesitate to make decisions, but I feel that the purchase of the Birmingham Electric Company by Jefferson county should be decided by the people of Jefferson county."

Replying to renewed pressure from a small group for quick action looking to purchase of BECO, County Commission President R. H. Wharton has also announced that the county would not be stampeded into a hasty decision on a matter involving between $20,000,000 and $30,000,000.

The county, Wharton explained, has asked the National Power & Light Company for a price on its BECO properties, but in addition to the price, a number of complications, legal

and otherwise, must be ironed out before the county can go into the question more fully.

The commission received a letter from the National Power & Light Company indicating it would cost more than $29,000,000 for the county to own BECO outright and that National valued its equity in BECO at more than $10,000,000.

Commissioners said they were still considering the letter, written by P. B. Sawyer, National president, but let it be known they considered negotiations had struck a definite snag, chiefly because of the unexpectedly high value placed on BECO and because of National's apparent desire not to sell the power system separately.

Arizona

Hearing Delay Requested

A FOUR months' postponement of the Federal Power Commission's hearing on the complaint of Governor Sidney P. Osborn against the El Paso Natural Gas Company and its affiliates was recently asked by the Texas utility concern.

The hearing was docketed early last month for September 9th in Washington, D. C. The utility was said to desire that the hearing be held in El Paso. The concern also advised the commission that matters contained in the governor's complaint could be settled without the necessity for a hearing.

The Arizona Corporation Commission was said to contemplate representation at the FPC hearing.

Arkansas

REA Dismantling Not Discussed

PURPORTED plans for dismantling the Ark-La Electric Coöperative's power transmission line between Markham's Ferry, Oklahoma, and the Jones Mills Works, aluminum plant near Malvern, were not discussed in Washington, Thomas Fitzhugh, Ark-La lawyer, said after returning from the capital recently.

He professed to be "amazed" by newspaper articles concerning the possibility of an abandonment. Mr. Fitzhugh alleged that private power company representatives offered to purchase Ark-La's line at a Washington conference, but Ark-La is not interested in selling. The Southwest power pool asked that no charge be made for delivering power pool energy over Ark-La's line. No agreement was reached. Most of the power delivered to the aluminum plant will be transmitted from Grand River dam.

Mr. Fitzhugh said that he went to Washington at the invitation of Frank Wilkes, president of the Southwestern Gas & Electric Company and a former Arkansas Power & Light Company executive. Mr. Wilkes and representatives of the other companies were interested in acquiring the coöperative's line, financed by the Reconstruction Finance Corporation.

California

Warned to Pool Lines

JOSEPH B. Eastman, director of the Office of Defense Transportation, last month served notice on San Francisco that he would be compelled to use his authority unless facilities of the Municipal Railway and the Market Street Railroad Company are promptly consolidated.

Eastman's statement was interpreted by Utilities Manager E. G. Cahill as a threat by the Federal government to take over the two systems and operate them unless pending negotiations for consolidation are hastened by the city. The board of supervisors has previously sent to Eastman a copy of a resolution requesting him to inform the board as to whether he has authority to intervene in the negotiations looking toward purchase of the private line by the city and compel pooling of the two systems' facilities.

A curb on the "arbitrary powers" of the public utilities commission was recently demanded by civic leaders as a condition in an agreement for acquisition of the Market Street Railway. The group asked for right of appeal to the board of supervisors should the commission decide to abandon any existing Market Street service under consolidation.

According to Utilities Manager Cahill, consolidated operations of the two railways would yield a gross profit of $3,039,021 per year for the duration of the war. The estimate was made on the basis of actual receipts by both railways during March, April, May, June, and July, when daily receipts on the Municipal Railway averaged $12,756.

Layoffs Banned

APPARENTLY aimed at preventing further unauthorized walkouts of employees, such as the recent mass absences of linemen, the Los Angeles Board of Water and Power Commissioners passed a resolution last month authorizing department heads to discharge any employee who is wilfully absent from his duties. The resolution referred to a section of the rules of the board of civil service commissioners which reads as follows:

"No officer or employee in the classified civil service of the city shall absent himself from duty without leave except in case of sickness or great emergency."

The resolution then provided that the general managers be authorized and directed "to enforce said rule and to discharge any employee absenting from duty in violation thereof."

The walkout of linemen took place in mid-August, when several hundred of them left their job and demanded a $40-per-month raise. They finally agreed to go back to work, pending a settlement of the wage dispute.

Colorado

Dam Project Gets High Rate

A HIGH priority rating was assigned last month to the Green Mountain dam project by the War Production Board in the Bureau of Reclamation's program to add more than a million kilowatts of hydroelectric power to the nation's war supply by July, 1944, Leslie A. Miller, Denver regional director, announced.

The additional power from the Colorado project near Kremmling will become available before July, 1944.

Miller said the AA-4 rating had been assigned to the dam, a unit in the Colorado-Big Thompson project, in order to provide 21,600 kilowatts of power in February and March next year. The high rating was assigned, he said, to facilitate acquisition of two generators of 10,800 kilowatt's capacity each.

The Green Mountain power development will be speeded to completion, Miller said, to meet the increasing demand for war power in Colorado. Cutting in of the additional power from the Green Mountain project is expected to offset threatened shortages, he said.

Connecticut

Utility Celebrates Anniversary

THE Connecticut Light & Power Company, largest public utility in the state, last month celebrated the twenty-fifth anniversary of its organization, while engaged in the task of providing an unprecedented amount of power for the war industries of Connecticut.

Incorporated in August, 1917, during the first World War, the company, which at that time had a generating capacity of only 27,770 kilowatts, took an active part in supplying electricity and gas to the state's industries. Today, CL&P, its generating capacity increased to 194,145 kilowatts, together with Connecticut's other utilities, is making an even greater contribution to the war effort, President Charles L. Campbell pointed out in announcing the anniversary.

An indication of the company's growth is the increase in customers from 43,436 in 1917 to more than 200,000 today and the 600 per cent gain in generating capacity, with installation of another 45,000-kilowatt generator at Devon scheduled for this fall.

New Truck Operation Rulings

QUESTION of what the state might do to aid truck operations under new Office of Defense Transportation rulings requiring, with some exceptions, that commercial vehicles engaged in "over the road transportation" operate fully loaded was referred last month to the state public utilities commission for study and recommendations by the Connecticut War Conservation Committee.

John F. Maerz, field manager for the Office of Defense Transportation in charge of Connecticut, western Massachusetts, and Vermont, who attended the committee meeting, described its deliberations as "more or less confidential" and refused further comment.

It was expected the state commission would study ways and means of setting up information offices to aid truck operation under ODT regulations. These offices, which would be located in the larger towns and cities, would help secure cargoes for trucks and supply clearance papers for their operation when full loads are not found.

Emergency Connection Approved

THE Federal Power Commission on August 10th approved a 25,000-kilowatt permanent connection for emergency use only near New Britain, between the facilities of the

Connecticut Light & Power Company, Hartford, and the Connecticut Company, New London.

The commission said the action was to assure an adequate power supply for war industries being served by the two companies.

The commission said the order of authorization provided that the Connecticut Light & Power Company would not become subject to the commission's jurisdiction as a result of making the connection. The order said further that the authorization for the connection should terminate ninety days after the end of the war unless the commission extended it.

District of Columbia

Commission Chairman Ousted

GREGORY Hankin was ousted by his colleagues on August 17th from his position as chairman of the District of Columbia Public Utilities Commission and James H. Flanagan was elected in his place, effective September 1st.

The move, which Hankin said came as "no surprise to me," followed months of dissension within the 3-man commission, climaxed over the August 16th week-end with two concurrent disputes.

Flanagan and Engineering Commissioner Charles W. Kutz, third member of the commission, said that the step was taken "for the interest of the public and the benefit of the commission."

Hankin said he had been warned by his friends, "both in private and in PUC forums," that if he continued to "protect the public interest" he would be ousted as chairman. Flanagan's nomination was made by Kutz at a special executive session of the commission, and was seconded by the candidate. Hankin did not vote.

Indiana

ODT "Pools" Bus Service

THE Office of Defense Transportation on August 17th placed bus service between Ft. Wayne, Indianapolis, and Terre Haute on a war-time basis in its program for conservation and more efficient use of intercity bus facilities.

The Indiana Railroad Company, ABC Coach Lines, Inc., and Pennsylvania Greyhound Lines, Inc., were directed to honor one another's tickets, divert passengers, and stagger schedules between all points common to their lines, and to pool depot facilities.

Pennsylvania Greyhound was ordered to limit operations between Indianapolis and Terre Haute to through schedules extending beyond Terre Haute. Local schedules between these points will be operated by the Indiana Railroad Company. ODT estimated a monthly saving of 64,000 bus miles would result. The order was effective August 25th.

Mississippi

Gas Rate Cut Announced

FOLLOWING the announcement of the Interstate Natural Gas Company of a reduction in the gate rate on gas, the Mississippi Power & Light Company, local distributor, announced that the reduction would be passed along to Natchez consumers and in accordance with this had made a proposal to the board of mayor and aldermen for a revised schedule carrying substantial reductions in gas rates, particularly for smaller users.

The municipal board received the proposed rate and stated that it could be made effective as of the fifteenth of August, but final approval or rejection would not be given before the next meeting of the board.

The proposal includes the reducing of the minimum payment for the first thousand cubic feet of gas from $1.50 to $1.

New Jersey

Fewer Meter Readings

THE Public Service Electric & Gas Company announced recently that meters in rural districts will be read only once every three months, instead of every month, from September until the end of the emergency. For customers' convenience, monthly bills will

be submitted as usual, the company said, and in the intervals between meter readings the bill will be for an average sum based on an estimated meter reading. The actual reading on the third month will automatically wipe out any discrepancy between the estimated average and actual consumption.

Loses Court Test

THE third circuit court of appeals on August 12th upheld a Securities and Exchange Commission ruling that the Public Service Corporation of New Jersey is a subsidiary holding of United Gas Improvement Company and the United Corporation.

Judge Albert B. Maris, author of the decision, declared there was "no merit" in the company's contentions by which it sought to escape the requirements of the Holding Company Act, and added:

"Indeed, some of these contentions are so wholly lacking in merit as to border on the frivolous."

The SEC held that UGI, a subsidiary of United, together with United, own 13.9 and 28.4 per cent, respectively, of the outstanding voting securities of Public Service Corporation, which gave them control of the subsidiary.

New York

Seeks Service Change

THE Brooklyn Union Gas Company has asked the state public service commission to permit it to read meters of its 745,000 residential customers every two months instead of every month, as at present, it was reported recently. The step would save $180,000 a year. The commission was scheduled to hold a public hearing on the proposal August 21st.

The change, which was tentatively scheduled for September 1st, is required by a labor shortage caused by employees of the utility entering the armed services, the company said.

The petition was subsequently opposed by the Utility Workers Organizing Committee of the CIO on the ground that it would wipe out the jobs of "hundreds of employees." The union asked the public service commission to call a special hearing to consider this aspect of the petition.

Commission Upholds Gas Ban

THE state public service commission on August 13th approved a proposal by gas companies of the Long Island Lighting system to curtail the supply of gas for house-heating purposes to new customers, or for use in new equipment by present customers.

Fear among house occupants over the fuel oil supply this winter for heating had brought forth 325 unsolicited applications for heating gas, the companies in the group pointed out, and more applications were expected. The companies are the Long Island Lighting Company, Queens Borough Gas & Electric Company, Nassau & Suffolk Lighting Company, and Long Beach Gas Company.

Terminating a hearing before Commissioner George R. Van Namee on August 13th, the state commission vacated a previous order suspending the companies' proposal, originally made several months ago, and gave the utilities the go-ahead signal in their plan to restrict the use of gas.

The companies said at the hearing that in recent months they have had to supply large quantities of illuminating gas for war production purposes. The outgoing load of the companies is near their production capacity, it was testified, and they could not take on additional customers for house or space heating without enlarging their facilities.

Company officials pointed out that if they were forced to extend their distribution lines it was doubtful whether they could get priorities for the needed material.

The supply of gas for domestic use, or to existing space or house-heating service, will not be affected for the present, the commission announced, giving virtual assurance to persons who heated their houses by gas in previous years that they will be able to do the same this winter.

FPC Denies Rehearing

THE Federal Power Commission on August 17th denied a petition by the Niagara Falls Power Company for a rehearing on an order disallowing $15,787,600 of the book value of the company's project No. 16 near Niagara Falls, New York.

Under the terms of the order, which culminated a 20-year controversy and determined the actual legitimate original cost as of 1921 to be $24,680,000, $15,587,900 of the total disallowed was to be placed in the earned surplus account and the remainder transferred to other accounts.

Tax Refund Granted

SEVERAL million dollars in "illegally collected utility taxes" will be refunded to New York building owners as a result of a decision in a case brought by the public utilities committee of the Real Estate Board of New York to test the validity of the state utility tax as applied to submetering by building owners.

Harold J. Treanor, counsel to the Real Es-

tate Board, and Morway Picket, specialist in utility tax matters, handled the committee's case, which was carried through the state courts to a recent decision by the court of appeals. The validity of the tax was upheld by the court in a 4-to-3 decision, but it denied the right of the legislature to extend the tax retroactively for the period specified in the act. It held "this provision for full retroactivity to be harsh and oppressive as to transgress the constitutional limitation." The retroactive provisions are therefore invalidated for the two and one-half years prior to January 1, 1940.

The three dissenting justices, on the other hand, in an opinion written by Justice Ripley, favored complete abolishment of the tax. The justice declared that the petitioner, in the test case, the Laciden Realty Corporation, was not a utility and consequently not liable for the tax. The writer of the dissenting opinion and the two concurring justices condemned the action of the legislature in imposing the tax, calling it "unreasonable, arbitrary, capricious, and unjust in violation of the due process clauses of the state and Federal Constitutions."

The order of the court, therefore, according to the board, directed the state tax commission to refund all money collected from building owners under the law during the period before 1940. As the statute called for an impost of 2 per cent on the gross receipts of submetering of all utilities, it was estimated by the board that the decision would force a refund by the tax commission of more than $2,000,000 in taxes on the resale of electric current alone.

No estimate had been made, the board stated, as to other refunds necessary because of the illegal collection of taxes on the sale of telephone, water, steam, gas, and other utility resales.

In a decision rendered the same day in a case involving the 436 West Thirty-fourth Street Corporation, which tested the validity of the city utility tax on submetering receipts, the court sustained the local law by a similar division, four to three.

Ohio

Refund Hearing Set

HEARING of the $200,000 gas refund case in which the report of the Ohio Fuel Gas Company is to be considered would be held September 11th, it was announced recently by Federal District Judge Mell G. Underwood. The city had asked possession of $200,000 which was not claimed by persons entitled to gas refunds.

Rates Based on Prudent Investment

THE Cleveland law department has drafted a proposed amendment to the state Constitution to abolish the perennially controversial method of rate determination used by the state public utilities commission and to require that rates be fixed on the basis of the actual amount of money a public utility has "prudently invested" for service to its customers.

This was disclosed last month on completion of a report to the city council by Law Director Thomas A. Burke, Jr., and Assistant Director Spencer W. Reeder, in charge of utility rate litigation, who said that by amending the Constitution the people of Ohio could wipe out the reproduction cost method of rate making and substitute the prudent investment method—something the general assembly has been unwilling to do.

The Burke-Reeder report, prepared in answer to a request by the city council, is the outgrowth of an order by the Federal Power Commission to the Hope Natural Gas Company of West Virginia, requiring it to reduce by around $2,815,000 a year its wholesale rate to the East Ohio Gas Company of Cleveland, which gets 77 per cent of its supply from Hope.

Under existing state law, the Ohio Public Utilities Commission must give weight, in determining a rate, to the theoretical cost that would be entailed if a public utility reproduced its entire plant on a given date.

Pennsylvania

Commission Eases Bus Curb

WAR emergency orders of the state public utility commission on August 19th were amended to enlarge permissible bus charter service in conformity with regulations of the Office of Defense Transportation.

The commission last June restricted such service mostly to the armed forces, inductees, schools, and the like. The amendment permits these other services: (1) prisoners and insane; (2) juries and custodians; (3) employees between their homes and work; (4) children under eighteen to summer camps; (5) persons between their homes and places of worship; (6) civilians from their homes for

purposes of evacuation in the interest of their safety or to serve military purposes; (7) passengers of common carriers by railroad or by air en route on an established scheduled service temporarily discontinued or interrupted.

Would Reopen Testimony

THE Philadelphia Transportation Company, it was reported last month, has launched a move to use the recent near-strike as a possible wedge for a trolley fare rise. The move took the form of a petition filed with the state public utility commission to reopen testimony in the pending fare case for evidence of the wage dispute.

That dispute narrowly escaped tying up the city's transit system, which carries 300,000 war workers daily, by a walkout early last month. A last-minute agreement between PTC and the PRT Employees Union for submission of all controversial questions to the National War Labor Board for arbitration averted the threatened strike of 10,500 employees.

The recent petition asked that the PUC, which was told in July that testimony was concluded and closed, reopen the case for the specific purpose of placing on record—with or without an additional hearing—the arbitration agreement. PTC asked further that the record remain open for evidence of any further developments in the wage dispute.

Pay Increase Given

FIVE per cent wage increases aggregating approximately $300,000 a year were granted last month to 1,400 hourly paid employees of Duquesne Light Company in a contract revision approved by the Independent Association of Employees of Duquesne Light Company and Associated Companies.

Negotiations for increases in behalf of salaried workers were to begin August 13th.

In addition to the wage increase, the contract revision established a rigid seniority system and provided that all job vacancies shall be made available to employees who can qualify.

Tennessee

Commission Cites Utility

THE state railroad and public utilities commission on August 15th issued a citation against the Tri-City Utilities Company, Jellico, to appear before it on September 9th and show cause why the commission should not prefer an information to a district attorney charging discriminatory practices in violation of the utility statutes.

In seven specific instances the company was charged with having billed customers "in a manner preferential to said customer in that the minimum charge for such customer was not applied," and with transferring customers to a different classification of rates, and with having applied special rates "which appeared never to have been published, filed with, or approved by the commission." The alleged offenses covered a period from September, 1941, to June, 1942.

The citation also alleged that between September, 1941, and June, 1942, the Tri-City Utilities Company "failed to comply with the rules and regulations as provided in the company tariffs as filed and approved by this commission, by reason of said company's failing to render monthly bills to all of its customers and by failure to apply penalties for delinquent payments, as provided for in said company's tariff filed with and approved by this commission."

The Tri-City Utilities Company is the successor to Kentucky-Tennessee Light & Power Company, and the citation was based on an investigation made by the staff of the state commission during the early part of August.

Utah

State Opens Probe

THE state public service commission on August 14th directed its secretary to prepare and file a complaint against the Utah Power & Light Company for the purpose of investigating thoroughly the company's valuation, practices, and rates.

The motion authorizing this step was made by Chairman George S. Ballif, seconded by Commissioner Donald Hacking and voted for by these members and by Commissioner Carlson. It directed Charles A. Esser, secretary, to "prepare, file, and serve upon the company a complaint alleging that the rates and charges of the company are unreasonable, unjust, and excessive, and calling upon the company to answer the complaint within thirty days and to produce evidence as to the value of its property for rate-making purposes and as to the reasonableness and justness of its rates, charges, and practices at a public hearing and investigation to be held following the time for the filing of the company's answer to the com-

plaint." It was explained that this proceeding was the culmination of a study that had been made by the engineering and accounting staffs of the commission over a period of years. The Federal Power Commission has made a similar study.

Virginia

Gas Connection Warning Issued

FAMILIES with gas stoves or gas refrigerators who move on September 1st into houses that lack a connection with the Richmond gas system will be unable to get the connection, according to Utilities Director Hobson, who recently warned everyone planning to move to ascertain whether their new homes are wired or piped for gas or electricity.

Recent rulings of the War Production Board restricting the use of materials prevent the installation of new utility connections, Mr. Hobson said. Exceptions have been obtained for defense housing projects approved for the war effort and for the annexation area where health conditions make it necessary to install water facilities.

Hobson suggested that householders planning to move find out whether their new quarters are piped or wired for gas and electricity by calling the city department of public utilities or Virginia Electric & Power Company.

Washington

Dam Extension Held Up

PLANS for increasing the height of Seattle City Light's Ross dam were held up by the city council last month after a conference with Eugene R. Hoffman, lighting superintendent. Hoffman said the project would cost more than $10,500,000, instead of the $8,300,000 the city has available, and the council asked the War Production Board to help finance the structure, inasmuch as the government asked that it be built.

The call for bids on the sale of City Light bonds to finance the work was canceled.

Seattle housewives last month were told they need not fear their electric ranges would be shut off. Federal and city authorities alike discounted a report that rationing of electricity is imminent and that electric ranges might be disconnected. Lighting Superintendent Hoffman said there is no power shortage in Seattle and not likely to be soon, and that there had been no consideration of cutting out electric ranges.

Wisconsin

To Save on Electric Bills

ABOUT 175 customers of the Belmont municipal utility, Lafayette county, will save $547 a year on their electric bills through new rates accepted by the utility, the state public service commission has announced. One hundred thirty-eight residential customers will save $194 a year; 35 commercial customers, $322; and one power customer, $31.

Wyoming

Gas Rate Appeal

STATE Attorney General Ewing T. Kerr last month said his office would request the tenth circuit court of appeals at Denver to dismiss an appeal to the court by the Colorado-Wyoming Gas Company from a Federal Power Commission order reducing natural gas rates charged utilities serving Cheyenne and several Colorado cities.

Kerr said a motion for dismissal of the appeal would be sent to Denver, August 14th. Assistant Attorney General Arthur Kline, who is handling the case for the state, said the court would be asked to dismiss the appeal on the ground that it was without jurisdiction.

Kline said the FPC ordered a $58,000 reduction in pipe-line "gate rate" charged the Cheyenne Light, Fuel & Power Company. The order was effective last June 15th, he said, but because of the pipe-line company's appeal the money representing the reduction has been deposited with the court pending a decision in the case.

The Latest Utility Rulings

Restriction on Leased Wires to Connect Private Systems Upheld

TARIFFS and practices of a telephone company governing the leasing of wires for the purpose of connecting privately owned and installed communication systems have received the sanction of the New York commission as against charges of unreasonableness and discrimination. The company has consistently refused to lease wires owned by it for the purpose of connecting such privately owned and installed communication systems with telephones at other locations.

At the outset the commission overruled a challenge to its jurisdiction, holding that it has jurisdiction over the reasonableness and legality of tariff provisions controlling the company's practices of leasing wires and has power and authority to require a company to change or modify such tariff provisions if they be found to be unjust or unreasonable or otherwise in violation of the provisions of the Public Service Law.

The claim that the present practices constituted unjust discrimination was based upon the fact that the company refused to lease its wires for the purpose of connecting isolated privately owned intercommunicating systems and did at the same time lease its wires for many other purposes. The evidence established that telephone wires are regularly so rented by the company for the following purposes:

Private lines not connected to the general exchange system, the wires used and the instruments attached to them being owned and maintained by the company. Brokers were said to be the principal users of private line systems.

Teletypewriter and Morse use; program transmission in connection with telephone broadcasting; wires for remote control of radio, telephone, and telegraph stations; wires used for signaling, with bells or gongs; entrance channels for communication companies; telephoto transmission; facsimile and television transmission; circuits leased to Western Union and Postal Telegraph.

Juke box service, the juke box consisting of a cabinet with a loud speaker, a microphone, and a coin-collecting device, the cabinet being placed in premises such as restaurants or amusement centers, and circuits leased leading from such premises to a studio where phonograph records are played by operators when requested by patrons.

Lines connecting with military reservations, where civilians are not permitted to enter many parts of the reservation.

Instrumentalities and circuits required to furnish railroad general offices and other offices on the same basis as any other subscriber, under an agreement pursuant to which the circuits along railroad rights of way are owned and maintained by the railroad companies and terminate in a private branch exchange system owned by the telephone company. Such circuits are not to be connected, however, with the general office telephone exchange system except in cases of emergency.

Power company circuits treated in the same way as railroads, with the exception that power companies are not permitted to own circuits for telephone use within base rate areas.

Service stations or service lines connected to a central office or a toll station of the telephone company. There were said to be approximately 5,000 telephones in the state served on this

basis. The members of the association build a pole line and string the necessary wire and put in instruments for the use of persons along their line. They operate in sparsely settled rural communities.

Service to fire towers, ship telephone service, New York city department service, and interchange of facilities between telephone company and telegraph company. *Re New York Telephone Co. (Case 10552).*

Tariff Provisions for Cost Variations Disapproved

INSERTION in rate schedules of general clauses relating to purchased power, fuel, and taxes are not, in the opinion of the Pennsylvania commission, the only or best means by which a public utility may be protected against increases in operating and tax costs which result from the present extraordinary or emergency conditions. This announcement was made in a case in which a provision relating to an adjustment in the cost of purchased power and increases in tax rates, as proposed by an electric company, was disapproved.

While it is true, said the commission, that during periods of emergency many types of operating expenses and taxes sharply increase, it is likewise true that revenues usually increase, and the final result sometimes is an increase in the net return. A review of the company's operations since the year 1940 did not indicate the necessity of the proposed protective provisions. *Pennsylvania Public Utility Commission v. Edison Light & Power Co. (Complaint Docket No. 11108).*

Safety Standards Relaxed for Track Construction to War Industries

AUTHORITY to construct, maintain, and operate a spur track under a bridge, across a city street, and into a warehouse building in the city of St. Louis was granted by the Missouri commission although the track would have clearances not in conformity with the commission's General Order No. 24 and would cross the street at grade. A manufacturing company, under contract to supply the United States government with articles for the armed forces, uses the warehouse.

The Brotherhood of Railroad Trainmen opposed the grant of authority on the ground that nonstandard clearances established would be in place not only during the war but also would continue as a permanent hazard as long as the business exists and continues to use rail facilities. The proposed construction would have less than standard vertical clearance at two locations and, in addition, the horizontal clearance prescribed by the commission's general order would be encroached upon by substandard construction.

The commission said:

> The approach to the grade crossing which will be created is not at all satisfactory, but the vehicular traffic is extremely light. Under normal conditions it appears that we would be inclined to deny an application of this type because of the numerous undesirable features, and we are of the opinion that if it were not for the abnormal conditions existing at present the applicant, F. Burkart Manufacturing Company, would erect a new structure. However, in view of the present war circumstances, the difficulty in securing materials of construction, and the exigency of the situation, it appears that the application should be granted. Although there is an element of hazard involved, it appears that the hazard can be minimized by careful operations, and the erection of proper warning signs.
>
> With reference to the question of imprac-

ticability of construction at standard clearances, we are of the opinion that the requirement is flexible and is dependent somewhat upon the availability of materials of construction. We are well aware that such items of construction are decidedly limited at this time and accordingly find that construction with standard clearances is impracticable.

Re F. Burkart Manufacturing Co. (Case No. 10236).

Restriction of Gas for Heating Compelled By War Conditions

THE most reasonable method of meeting the present emergency, and one which would cause the least hardship to the general public, when the adequacy of gas supply is threatened because of war conditions is a proposal to supply gas service only to existing house-heating equipment of customers and to decline to supply such service to new customers. This was the conclusion of the New York commission in a proceeding where it was said:

> If, as a result of a sharp upward trend following the addition of a considerable amount of new space-heating load, it should become necessary to provide for a greater supply of gas either by augmenting existing gas production facilities or by the establishment of interconnections with other sources, it is doubtful if these measures could be effected in time to alleviate a critical situation. It must also be borne in mind that the requisite materials for such construction are subject to priorities and this must of necessity depend upon their current availability and the degree of importance attached to the project by the War Production Board. Moreover, such additional plant facilities might constitute an unreasonable burden on general customers after the present emergency is past. In addition, the possibility of future difficulties in securing adequate supplies of basic gas-making materials is one that cannot be ignored.

An alternative measure, said the commission, would be to reduce the quantity of gas to all space-heating installations when the sources of supply are unable to meet the demands of the system. This, however, would be a hardship to customers supplied with gas space heating. *Re Long Island Lighting Co. (Case Nos. 10822-10825).*

Charges by Telephone Company to Hotels, Apartment Houses, and Clubs Upheld

AN investigation of rates charged by the New York Telephone Company to hotels, apartment houses, and clubs, involving also a question of compensation to hotels, was closed by the New York commission. The unreasonableness of present charges had not been proven and the evidence as to compensation indicated that the hotels were generally obtaining in the form of local and toll surcharges alone an ample amount to cover the reasonable cost of outside telephone service for guests above the amount paid to the company for local and toll messages.

The hotels practically conceded the reasonableness of over-all equipment rentals. Their strategy consisted of an apportionment of the equipment rentals along with other expenditures of the hotels as between guest outside telephone service and interior and management outside telephone service, together with the proposition that the hotels should not be responsible for that portion of rentals which could be considered applicable to guest outside service.

Despite the position taken by the hotels, said the commission, the reasonableness of equipment rentals charged by the telephone company was a question which was distinctly at issue in the proceedings. The commission said further that if the equipment rentals alone should be found to yield more than the associated cost and a reasonable return they would ap-

pear to be excessive, but if they did not they were not necessarily too low.

The hotels contended that the amount which the company charges them for rental of switchboards, trunks, extension stations, etc., should be reduced by various percentages alleged to represent use for guest outside service. The commission ruled that the rentals had not been proven to produce an excessive average return to the company, and unless they were shown to be too high the company was presumed to be entitled to them. The commission continued:

> If the hotels were to pay only the percentage that they conceive to represent guest interior and management use of the equipment, under the doctrine that the guests, if anybody, owe the rest of the rental charges, the hotels and not the telephone company would do the actual collecting of both components of the full amount; and the hotels continue to do so as long as the guests are able to pay for the cost of all service. The over-all charges to guests are not established by this commission, but by the hotels themselves, subject to competition. The evidence shows that the payments of guests for message charges alone equal or exceed the cost of guest outside service in various instances, and the 1941 revenue figures indicate a generally profitable situation. The hotels have not been shown to have incurred legitimate and necessary costs of telephone service beyond their ability to recover these from their guests. As previously stated, there is no legal compulsion on the hotels to render telephone service to their guests. The telephone company is not entitled to charges that yield it more than a fair return; but in the absence of proof that such charges are excessive, no reason appears for making a division of the rentals, for which, and for the other costs, the hotels and not the telephone company collect from the hotel guests, as long as the hotels see fit to render the service and the guests are able to pay.

As to a contention that extension telephones in guest rooms should carry the 50-cent residence rate instead of the 80-cent business rate, it was pointed out that the evidence on cost did not justify the reduction. Moreover, the claim that a hotel guest room is the guest residence was said not to be conclusive as to a reclassification. It could also be stated that the hotel is a business enterprise. Hotel rooms are not like private residences generally, and the use of a guest telephone whether for outside or interior service may be for business or social purposes. *Re New York Telephone Co. (Case 10064).*

Billing on Bimonthly or Quarterly Basis Permitted

THE Connecticut commission has approved the following provision to be added to the "Terms and Conditions" of the Hartford Electric Light Company:

> When the bills are rendered bimonthly or quarterly according to the company's routine for meter readings, the number of kilowatt hours specified in schedules for the monthly blocks shall be proportionately increased. In intervening months an interim bill shall be rendered approximating in amount that of an average month's bill, with payments appearing as a credit on the bill for the full billing period. Such interim bills shall be payable monthly in the same manner as bills based upon actual meter readings.
>
> At the customer's option bills will be rendered for intervening months based upon readings furnished by the customer, subject to adjustment in the bill rendered according to the next reading taken by the company.

While there would be some economy due to the reduced car mileage and release of man power to munition production, the economy, said the commission, is small and the incidental financial advantage to the company is not a factor in the proposal to go on the bimonthly meter reading. The purpose is conservation of man power, gasoline, and rubber in the national emergency. The commission states that if, at the termination of the national emergency, bimonthly or quarterly reading has been demonstrated as fair and satisfactory to customers, it can be the subject of consideration as a permanent practice.

The public service commissions of the states of Massachusetts, Michigan, Wisconsin, Georgia, and South Carolina, the commission recalled, had approved bi-

monthly reading of meters. See Re Electric Utility Companies' Rules and Regulations (Ga 1942) 44 PUR(NS) 193; Re Change in Method of Monthly Billings (Mass 1942) 44 PUR(NS) 129.

Commenting on the effect, the commission said:

> The great majority of domestic customers will not be affected by the proposal. A small percentage of customers may be affected if their use of electricity varies considerably between consecutive months and if the variance in the use takes place where the blocks of electricity in the rate schedule change. Such differences, however, will be slight unless the variation in use is very substantial. As set forth above, any customer regarding himself adversely affected by the proposal may read his own meter and be billed each month according to the meter reading.
>
> The effect of bimonthly or quarterly reading on commercial customers is the same as the effect on domestic customers. Approximately three-fourths of the commercial customers are on block schedules with the measured demand, and the effect upon those commercial customers is the same as the effect on domestic customers. About one-fourth of the commercial customers have measured demands, either chart or indicating meters. Almost all the indicating meters are in densely settled sections, mainly on the premises of large customers. These meters the company expects, for the present, to read monthly.
>
> A study of seventy of these customers in the outlying territory of the company shows that in the past year, if the demands had been carried over a two months' period, instead of a one month period as actually billed, the total increase in revenue from the group would have been 0.8 per cent. A few of the larger customers accounted for a substantial part of the differential. The company proposes to put this group on a bimonthly reading basis except for the larger customers therein. It further proposes to put all of the commercial customers having a measured demand on a bimonthly basis as soon as possible, after further study and consultation with the commission's technical staff.

Re Hartford Electric Light Co. (Docket No. 7230).

License Revocation Recommended When Taxicab Driver Refuses to Coöperate

A TAXICAB driver who states that he will refuse to abide by lawful orders of the commission and who is not willing to abide by agreements to end rate controversies is not a fit and proper person to be a licensed driver, according to the District of Columbia commission. The driver in question, according to the commission, was not interested in effecting equitable regulations for taxicab operations in the District, and it was not his desire to put an end to all controversies relating to zones and boundaries; nor was he, according to the commission, willing to abide by any agreement made by him or any lawful orders issued by the commission with reference to the operation of taxicabs.

Several conferences had been held by the commission members with representatives of taxicab drivers, owners, and operators. A request for the revision of zones and rates had been presented. Rate revision could be made effective immediately, but revision of zone boundaries would require extensive hearings. At one of the conferences, said the commission, it was agreed by all the representatives of the industry, including among others Edwin A. Glenn for the taxicab drivers, that it would expedite the settlement of the taxicab problems if rates were changed immediately. Later Glenn denied that he had agreed to an order changing rates. Other representatives of the industry stated that such agreement had been reached. In the words of the commission:

> Thereupon, Edwin A. Glenn questioned the authority of the commission to issue any order which would require the taxicab drivers to abide by such new rates until all questions pertaining to both rates and boundaries had been disposed of. Asked by the chairman of the commission whether he would refuse to abide by the lawful orders of this commission, Edwin A. Glenn answered that he would refuse to do so.

The commission ordered that its recitals of facts be transmitted to the commissioners of the District of Columbia,

with the recommendation that the District commissioners refer this matter to its Board of Revocation and Review of Character Licenses, to the end that the license of said Edwin A. Glenn to operate a taxicab in the District be revoked immediately. *Re Glenn (Order No. 2350).*

Other Important Rulings

A GAS and electric corporation was authorized to purchase a utility plant and franchises from a municipality where it appeared that 25-cycle energy would no longer be available in the area, that the village had no funds with which to pay the cost of a changeover to 60-cycle energy, and that it could not legally borrow the funds required for such purpose, although it was doubtful if revenues to be derived by the corporation could support such a total investment. *Re New York State Electric & Gas Corp. (Case 10591).*

A reclassification of stock to withdraw voting rights of certain preferred stockholders was permitted by the New York commission, where the purpose was to permit the company to participate in a consolidated income tax return with its parent and affiliated companies so that it might effect a substantial saving in Federal income taxes. It was observed that while the benefits would appear to accrue principally to the stockholders and to the corporation as such, it had been asserted that public interest would be vitally affected, since if the company paid this tax, it might be necessary to apply for a rate increase. The voting rights did not appear to have been of any practical benefit since the parent company held its own voting control. *Re Rochester Gas & Electric Corp. (Case No. 10849).*

Where trustees of a registered holding company, respondents in proceedings under § 11(b)(1) of the Holding Company Act, made no claim and submitted no evidence that certain properties might be retained under the standards of the act and where such properties clearly did not fulfill such standards, the Securities and Exchange Commission held it to be appropriate to order divestment of such properties immediately before considering what other properties were retainable under the act. The commission also held that pending Federal tax legislation was not a factor relevant to the proposed order for divestment of scattered property. *Re Driscoll (File No. 59-32, Release No. 3729).*

Voting trustees who had terminated a voting trust agreement, and who no longer held power to vote 10 per cent or more of the total voting securities of a registered holding company, were declared by the Securities and Exchange Commission to be no longer a holding company pursuant to § 5(d) of the Holding Company Act, but the condition was imposed that the voting trustees should not vote the remaining shares outstanding in their name. *Re Duff et al., Voting Trustees for Class A Common Stock of Peoples Light & Power Co. (File No. 30-87, Release No. 3730).*

The Wisconsin commission, in ordering service by a transportation company having an exclusive privilege under a franchise in a city, declared that the company owed a duty to render adequate service and could not escape the performance of any particular part of that duty because of any claim that such part of its existing service was unprofitable, in the absence of a showing that all of the service rendered under its privilege was being furnished at a loss. *Wauwatosa v. Milwaukee Electric Railway & Transport Co. (2-R-609, MC-991).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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Points of Special Interest

Titles and Index

TITLES

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Re Electric Utility Companies Rules

[File 19314–1 Non-Docket.]

Payment, § 17 — Meter reading and billing — War-time restrictions.

A quarterly meter reading period on rural lines, with an alternative plan for customers who desire to read the intervening months' consumption of their own meters and submit the monthly readings on forms mailed to the customer by the company, should be prescribed for electric utility companies during a war period when unnecessary waste of rubber, gas, and labor is necessary.

[June 30, 1942.]

PROCEEDING *relating to meter reading and billing during war time; quarterly meter reading, with alternative of customer readings, prescribed.*

By the COMMISSION: During the past year, this Commission has made every effort to provide relief from the effect of the war effort on its existing rules and regulations by making adjustments wherever it was possible to do so without drastically interfering with company operations or adversely affecting costs to the consumer.

The absolute necessity for the conservation of the nation's rubber supply makes it our duty to limit wherever it is possible the compulsory use of the automobile. Under our present rules requiring the operating utilities to make monthly readings of its meters each company must supply a great deal of automobile transportation.

In order to translate that requirement into car miles a survey has been made of the meter reading routes of the Georgia Power Company of more than 10 miles in length where automobiles are now being used to transport the meter readers. This study reveals that there are some 375 routes with 106,000 meters, requiring more than 20,500 car miles per month to do this work.

For some time this Commission, in an effort to prevent this unnecessary waste of rubber, gas, and labor, has had under consideration various plans of making periodic meter readings. Proposals have been made that the meters along such routes be read by the consumers themselves and reported monthly on printed forms sent out by the company; plans have also been considered which provide for quarterly readings by the company and the use of estimated bills for the intervening months. Actual tests have been made of these proposals and modifications have been added to overcome certain difficulties encountered in the actual application of these plans.

After reviewing and studying the results of these tests, this Commission has decided to prescribe a quarterly meter reading period, with an alter-

native plan for customers who desire to read the intervening months' consumption of their own meters and submit the monthly readings on forms mailed to the customer by the company.

Wherefore upon careful consideration of the various meter reading plans and the urgent need for immediate coöperation with the government rubber conservation program, it is, therefore

Ordered: That all electric utility companies operating in Georgia following the next regular meter reading, shall be relieved of the requirement of making regular monthly meter readings and may thereafter secure quarterly readings of all residential and commercial electric meters without demand attachments located along the rural lines, except where the customer elects to read his own meter in the intervening months and forward the readings to the company on forms sent out for that purpose. The basis of the intervening monthly billings, where estimated consumptions are to be used, will be the average of the customer's kilowatt-hour consumption of the preceding quarter, for all customers with earlier readings. The billing for the month when the meter is read by the company will be the difference between the sum of the kilowatt hours previously billed, using estimated or customer readings and the total kilowatt hours actually consumed, as recorded by the meter during that period. The established rates applicable to each service will be applied without change to all bills, including the estimated bills, which will be computed as though they were actual readings.

Ordered further: That the meters of all new customers shall be read on the same basis as herein provided except that where such customer does not elect to read the meter, billings will be rendered on the basis of a predetermined estimated consumption and provided further that the average consumption per month, as determined in each quarter of the first twelve months billed, where estimated bills have been rendered, will become the base bills of such new customers for all future calculations.

Ordered further: That all electric utility companies under the jurisdiction of this Commission shall proceed without delay to prepare and file rules and regulations in conformity with this order, subject to complaint and further order of the Commission.

WISCONSIN PUBLIC SERVICE COMMISSION

Re Milwaukee Gas Light Company

[2-U-1803.]

Merchandising and jobbing, § 2 — Jurisdiction of Commission — Servicing customers' installations.

A filed schedule prescribing charges for all repair and maintenance work on customers' appliances and installations and the servicing of those appli-

ances by a gas company does not constitute a schedule of charges for utility service and is not subject to the jurisdiction of the Commission, as the work covered is more in the nature of a merchandising operation upon merchandise sold by others as well as the utility.

[May 22, 1942.]

PROPOSAL *of gas company to revise schedule of rates for servicing customers' installations; proceeding as to proposed charges dismissed for lack of jurisdiction.*

By the COMMISSION: On December 2, 1941, the Commission informed the Milwaukee Gas Light Company that it had accepted and placed on file an amendment of the schedule of the charges for servicing customers' installations submitted on October 20th. Subsequently upon receipt of complaint that the charges therein contained constituted an increase in rates for the utility under § 196.20(2), the application was given consideration as one to change rates and because the proposal involved an increase, public hearing was required. A number of hearings have been had; on February 19, 1942, at Madison, March 13th at Milwaukee and April 3rd at Madison, all before Examiner Calmer Browy.

APPEARANCES: Bert Vandervelde, Attorney, B. T. Franck, Vice President, P. J. Imse, Assistant Secretary and Treasurer, F. S. Burns, Shop Superintendent, and T. E. Hays, for Milwaukee Gas Light Company.

In opposition: Walter J. Mattison, City Attorney, by J. L. Bednarek, Assistant City Attorney, for city of Milwaukee; Roy R. Stauff, City Attorney, for city of Wauwatosa; John C. Doerfer, City Attorney, for city of West Allis; Chester Walczak, Milwaukee, and Thomas Lansing, for C.I.O. Local No. 12018, Gas By Product Coke Workers, United Mine Workers, District 50 and Federal Local No. 18543, Coke and Gas Workers; Henry McNew, Executive Board Member, for Milwaukee County Industrial Union Council; Theodore Wangemann, Chairman, Milwaukee, for Committee on the Rising Cost of Living; Mrs. Joseph E. Nordstrand, Milwaukee, for Wisconsin State Conference on Social Legislation.

Briefs were filed by Miller Mack & Fairchild for the applicant, Milwaukee Gas Light Company, and Joseph L. Bednarek, assistant city attorney, city of Milwaukee; Roy R. Stauff, city attorney of the city of Wauwatosa; Local Union No. 12018, District 50, United Mine Workers, by Chester A. Walczak.

Opinion

At the outset we must determine the question of whether the charges involved in the revised filing constitute utility charges within the meaning of §§ 196.19 and 196.20. Counsel for the utility on first hearing moved that the matter be dismissed for lack of jurisdiction, because the filing did not constitute a filing of a change of rates for utility service, in which motion he was joined by City Attorney Doerfer of West Allis. He contends that the commodity which the utility has to sell is gas, and the statute refers only

to the rates charged for that particular commodity and the provision of § 196.20(2) is therefore inapplicable.

The objection was overruled by the examiner and exception taken. This motion was taken under advisement to be decided before the close of the case. The Commission holds that the exceptions to the examiner's ruling are well taken, and grants the motion of the company for reasons hereinafter stated.

This record has been carefully reviewed.

The filed schedule prescribes charges for all repair and maintenance work on customers' appliances and installations, and the servicing of those appliances. It provides, among other things, that there shall be no charge for a certain period of time consumed by the service of the utility employee. After the first fifteen minutes, which is the free time, charges shall be made at certain specified rates. The free time offered is less than the free time allowed under the old schedule, while the charges after the free time expires are increased.

Our consideration of the record leads to the conclusion that the filing does not constitute a rate increase within the meaning of § 196.20(2) and does not constitute charges for utility service. Were the instrumentalities upon which the work is to be done owned by the utility and none but utility employees permitted to service them, a different situation would prevail. But the work for which the charges apply is work that may be and is often done by other than a utility employee and does not constitute a part of the service which the utility undertakes to render under its indeterminate permit. It is more in the nature of a merchandising operation upon merchandise sold by others as well as the utility. By no process of reasoning can we conceive that an exactly similar service performed by others than employees of the utility, constitutes such others public utilities, responsible for the rendition of adequate service.

If this were a question of utility rates, the proposal of the utility would constitute an increase of such rates and be subject to hearing provided by § 196.20(2). Moreover, were that question before us, it is probable that we would be obliged to direct elimination of the free time now allowed in the schedule. Such free time provided would be in a rate schedule tantamount to permitting without charge as a sales inducement use of a certain amount of gas without charge before the rates became applicable. We would not condone this.

Because of this determination no occasion arises for consideration or discussion of the reasonableness of the charges to be applied for the services rendered under the schedule. It follows that the proceeding must be dismissed.

The Commission finds:

That the proposed charges for servicing customers' installations is not a utility rate under §§ 196.19 and 196.20, Statutes, and it is therefore without jurisdiction.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Alabama Power Company

v.

Federal Power Commission

[No. 7853.]

(— App DC —, 128 F(2d) 280.)

Appeal and review, § 28.7 — Decision by Federal Power Commission — Original cost of project — Proof.

1. The action of the Federal Power Commission in refusing to make an allowance for the cost of financing, engineering, and promotional services, in a determination of the cost of a federally licensed power project, was upheld where the record showed no adequate basis for an estimate of such expenditures and any estimate would be merely guesswork, p. 202.

Appeal and review, § 71 — Law of the case — Former ruling on Commission power — Accounting.

2. A judicial ruling, upon the review of an order of the Federal Power Commission determining actual cost of a federally licensed power project, that the Commission has authority to determine actual legitimate original cost and to require the licensee to set up its books to show the cost as thus determined, constitutes the law of the case, in part at least, when a later order of the Commission, after a remand with directions, is brought up for review, p. 203.

Accounting, § 3 — Powers of Federal Commission — Licensees — State authorities.

3. The Federal Power Commission is vested with summary and unlimited powers over the accounts of its licensees to the extent necessary to insure proper performance of its duties, even though there is a division of authority between it and appropriate state agencies, p. 203.

Accounting, § 3 — Powers of Federal Commission — Inspection.

4. The Federal Power Act clearly contemplates that the Federal Power Commission may require a licensee to establish and maintain accounts and that the licensee must allow the Commission to have access to all accounts which it does keep, p. 203.

Accounting, § 3 — Powers of Federal Commission — Original cost entries.

5. The Federal Power Commission has authority to require the amount found by it as the cost of a licensed power project to be carried as that cost on the books of account of the power company involved, p. 207.

Statutes, § 11 — Construction — Federal Power Act.

6. The Federal Power Act should receive a practical construction—one enabling the Federal Power Commission to perform facilely the duties required of it by Congress, p. 207.

Accounting, § 3 — Powers of Federal Commission — Accounts of licensee — Effect on recapture proceedings.

7. The Federal Power Commission is authorized to determine actual cost of a licensed power project without waiting for the institution of government recapture proceedings and to direct that the company's books shall properly reflect its determination, whatever effect the determination may be given in recapture proceedings, p. 209.

Accounting, § 3 — Federal and state powers — Licensed power project.

8. The Federal Power Act rather than the law of a state in which a federally licensed power company operates declares the standards which the Federal Power Commission must use in performing its duties with respect to the determination of the original cost of a power project and accounting records relating to the project, p. 209.

Accounting, § 48 — Federally licensed power project — Value or cost determination.

9. The Federal Power Act does not direct the Commission to find reasonable value or actual assets, but, instead, it directs that the Commission first determine the actual legitimate original cost of a federally licensed power project, p. 209.

Valuation, § 68 — Original cost determination — Federally licensed power project — Transactions with earlier licensees.

10. The fact that a federally licensed power company, a consolidated company, at the time of its formation paid to then existing licensees a consideration equivalent to the amount which such licensees carried on their books as the cost of power properties gives it no preferred standing over the earlier licensees and in no way affects the actual legitimate original cost of the power project, p. 209.

Accounting, § 3 — Powers of Federal Commission — Original cost — Increment of value.

11. An order of the Federal Power Commission determining the original cost of a federally licensed power project and directing the licensee to write off from its accounts items claimed to constitute a true increment of value is not open to the objection that the order thus illegally prevents the company from capitalizing actual assets, p. 210.

Water, § 18 — Federal licensing of project — Conditions to grant of privilege.

12. The grant by the Federal government of the privilege of exploiting the water resources of navigable streams may be made subject to conditions appropriate to safeguard the interests of the public, and a company which has received its license subject to such conditions cannot shuck off its obligations as a licensee and set itself up in another capacity or avoid the comprehensive and inclusive powers of the Federal Power Commission, p. 210.

Valuation, § 67 — Original cost determination — Federally licensed power project.

13. The Commission, in determining the actual original cost of a federally licensed power project, is not required to consider other elements of value than "actual legitimate original cost," as it might if it were engaged in the valuation of the properties of public utilities subject to its control under Part II of the act, p. 210.

Appeal and review, § 17 — Questions waived — Failure to introduce evidence.

14. A federally licensed power company which has been afforded every reasonable opportunity to present an issue upon a question and to discharge the

burden of proof which the Federal Power Act imposes upon it of justifying accounting entries which it chooses to make, but which instead has chosen to challenge the indisputable powers of the Commission, has thereby foregone the opportunity to question the propriety of a Commission order directing the disposition of such accounting entries, p. 216.

[March 30, 1942.]

REVIEW *of order of Federal Power Commission determining cost of power project and directing accounting entries; affirmed. For earlier decision of Federal Power Commission, see (1940) 37 PUR(NS) 35, and for former judicial decision, see (1937) 68 App DC 132, 21 PUR(NS) 225, 94 F(2d) 601.*

APPEARANCES: P. W. Turner and Walter Bouldin, both of Birmingham, with whom H. Cecil Kilpatrick, of Washington, D. C., and William M. Moloney, of Birmingham, were on the brief, for petitioner; Wallace H. Walker, Assistant General Counsel, and Charles V. Shannon, both of the Federal Power Commission, with whom William S. Youngman, Jr., General Counsel, and Stanley M. Morley, both of the Federal Power Commission, were on the brief, all of Washington, D. C., for respondent.

Before Groner, Chief Justice, and Miller and Edgerton, Associate Justices.

MILLER, A. J.: In 1921, the Federal Power Commission issued to the Alabama Power Company a license authorizing the construction of a hydroelectric project on the Coosa river, a navigable stream in the state of Alabama. Upon completion of the project the company filed with the Commission, in 1930, a cost statement claiming $10,646,056.76 as the total cost of the project. After audit, hearings, and reconsideration following application for rehearing, the Commission, on December 19, 1932, 1 Fed PC 62, found the cost to be $7,094,913.69, and ordered the company to conform its accounts accordingly. In 1933, the company filed suit in the district court of the United States for the District of Columbia to enjoin enforcement of the Commission's orders. Following a trial on the merits, that court dismissed the bill of complaint. On appeal, the United States court of appeals reviewed the proceedings and contentions of the parties in extenso; affirmed the Commission's determinations and orders in part and reversed in part. By way of summary this court said: "We hold that the trial court correctly sustained the Commission's allowances for land, taxes, and interest, and its refusal to allow the fee of the Dixie Construction Company. But we hold further that the trial court should have directed the Commission to consider the cost of the water right at Lock 15 and to have required the Commission to allow not merely the out-of-pocket cost of electric energy but the total cost exclusive of profit, and, therefore, to have required the Commission to determine whether or not the rate of 1.187 per kilowatt hour included any element of profit. We further hold that since

the case must be returned to the Commission in respect of the foregoing items, it would be proper for the Commission to allow the licensee further opportunity to introduce evidence of the cost of financing, engineering, and promotional services prior to 1913 included in the power company's claimed figure of $3,500,000.

"We therefore reverse the decree of the trial court with orders to direct the Federal Power Commission to proceed in accordance with this opinion."[1]

Pursuant to the court's direction, the Commission, between November 30, 1939 and January 9, 1940, held hearings on the remanded items and fixed the actual legitimate original cost of the project at $7,209,363.90; increasing its earlier determination in the following amounts: ". . . (1) $51,966.58 as the 'total cost exclusive of profit' of electric energy furnished by petitioner to the project during its construction; (2) $66,603.78 as the actual reasonable cost of this project's portion of the Lock 15 water right; and (3) $26,540.82 additional interest during construction." It found that the company had presented no evidence of the cost of financing, engineering, and promotional services prior to 1913 and made no allowance therefor.

On this appeal, the first question presented for our decision is the cost of the water right at Lock 15. In Alabama Power Co. v. McNinch,[2] we said: "The Commission erred, however, in failing to consider the cost to the licensee of the water right owned by the Wetumpka Power Company at Lock 15, which was down-stream from Duncan's Riffle. No lands at Lock 15 are involved in the Mitchell Dam project and apparently the Commission for that reason failed to allow the cost of any water rights at Lock 15. The record shows, however, that the Wetumpka Power Company had the right under Alabama law to develop Lock 15 by a dam which would have impounded water to a height which would have flooded Duncan's Riffle, the present site of Mitchell dam proper, to a depth of approximately 14 feet. The Mitchell Dam project therefore was erected in derogation of the water right of the Wetumpka Power Company at Lock 15, at least to this extent. The right of the Wetumpka Power Company passed to the licensee in the merger of 1913. The trial court should have directed the Commission to allow the introduction of evidence as to the cost to the power company in 1913 of the right of the Wetumpka Power Company to develop Lock 15 to an extent which would have made the Mitchell dam project impossible, and to allow such cost as part of the original cost of the project."

Both parties now agree that the cost of the water right at Lock 15 should be measured by the market value of the securities issued therefor. They disagree as to how that market value should be determined. At the hearing before the Commission, the company renewed its contentions—which were fully considered and rejected in our earlier opinion—as to the formula which should be used; and urges that we now abandon our earlier decision in favor of those contentions. Con-

[1] Alabama Power Co. v. McNinch (1937) 68 App DC 132, 153, 21 PUR(NS) 225, 255, 94 F(2d) 601, 622.

[2] 68 App DC at p. 147, 21 PUR(NS) at p. 246.

sistently with this steadfastly maintained position, the company introduced evidence to prove the cost of the water right at Lock 15, in terms of values "not as an isolated project, but as part of the more efficient and valuable two dam development [Mitchell dam and Jordan dam]. . . . made possible by single ownership of all dam sites. . . ." It insisted that the consideration paid for control of the water right at Lock 15 was in no way identical with the value of such water right when utilized at Mitchell dam and Jordan dam "in an economic two high dam development of the entire head in that stretch of the river." Its expert witness then set up as the "major factors which would determine the value of the water power sites . . ." reëstablished "as of a 1913 point of view . . ." the following: "1. The market and the ability of the market to absorb the power. 2. The number and size of the new hydro plants to be brought in on the system, the available capacity, and the schedule of development of these sites which were already owned by the company. 3. The construction costs which would be incurred in the development of these hydro plants, and the associated operating and annual carrying costs. 4. The cost of providing this power from the most effective alternative source. In this case that would be from steam plants. Consideration of the costs of power from alternative steam plants necessarily involves the determination of the capital cost of constructing such alternative steam plants, and the annual operating costs taking into consideration, the improvement in efficiency which could have been foreseen in 1913." His conclusion, as to the cost which should be allocated to Lock 15, is then summarized in petitioner's brief as follows: ". . . At this point, the witness exercised his expert judgment and opinion and stated that he would have advised the prospective purchaser that it would not be justified in paying more than one-half of the 1913 present worth of the sites, namely, for Mitchell $1,450,000; Jordan $2,300,000; Lock 14—$1,200,000; Lock 15—$750,000; Lock 18—$1,600,000. . . . The witness then used these last figures, representing his judgment or opinion, rather than any arithmetical calculation . . . in determining the value of the water rights at Lock 15 to the extent that the same contributed to the Mitchell dam project. The excess value of Mitchell over Lock 14, or the value contributed to the Mitchell property by Lock 15, was determined on the basis of these figures to be reasonably worth to a prospective purchaser $250,000."

It will be seen from the foregoing statement of the company's position that it failed to take advantage of the opportunity presented by our earlier decision, and elected, instead, to reopen large questions which were put to rest in that decision. It urges upon us at this time arguments supporting our power to reopen those questions. But we see no reason to do so. Moreover, we conclude that the Commission was justified, especially under the circumstances, in adopting, for its determination of the cost of the Lock 15 water right, the formula which it had used in determining the cost of other water rights, and which was approved

by this court in Alabama Power Co. v. McNinch.[3]

[1] No review is sought, on this appeal, of the Commission's allowance for the item of total cost, exclusive of profit, of electric energy furnished by the company during construction of the project. The only remaining item remanded for consideration by the Commission concerned the cost of financing, engineering, and promotional services prior to 1913, which was included within the company's claimed figure of $3,500,000. As to this, although opportunity was given, no evidence was offered; consequently, we hold, as we did in our earlier opinion, that where the record shows no adequate basis for an estimate of such expenditures, and any estimate would be merely guesswork, the action of the Commission in refusing to make an allowance was proper.

On this appeal a number of additional questions are presented, which grow out of the Commission's order of November 26, 1940, 37 PUR(NS) 35, 48, requiring the company to make specified accounting disposition of the allowed and disallowed items. These requirements are set out in the margin.[4] The company contends that

[3] 68 App DC at pp 145, 147, 21 PUR(NS) at pp. 242, 246: "We think the theory in valuing Parcel 214 was correct. In finding what the value of the parcel was at the time of the merger the Commission based its conclusions upon the last transfer of the land prior to the merger. This had been through the purchase in 1912 by the traction company of all the stock of the corporation which then owned Parcel 214. The payment which the traction company made was composed in part of securities. The Commission reckoned these at market value, which had been stipulated. . . . To the extent that the water rights involved in the Mitchell dam project had been acquired by the power company by filing plans, the rights cost the licensee nothing and the Commission properly allowed nothing. Parcel 214 at Lock 14, and Parcel 9 at Duncan's Riffle, however, were acquired by the licensee from a corporation and individuals interested in hydroelectric development. If any water rights attached to these parcels, the price paid for the acquisition of the land included the cost of the water rights to the liecnsee. The Commission's allowance of the cost of the land in Parcel 214 and Parcel 9, therefore, included the cost of the water rights if any.

"We think, therefore, that the Commission has made full allowance for the water rights at Lock 14 and at Duncan's Riffle."

[4] "The Commission orders that: (A) The licensee, Alabama Power Company, establish and maintain control accounts with reference to this project showing a total debit balance in its fixed capital accounts beginning with an entry of $7,209,363.99 ($7,094,913.69 previously allowed plus $114,450.30 now allowed in addition thereto) as the actual legitimate original cost of said project as of December 31, 1925;

"(B) The licensee establish and maintain subsidiary accounts showing and substantiating all entries in such control accounts, and classifying the total for fixed capital in appropriate detail and in accordance with the provisions of the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees, revised to December 31, 1936, pursuant to authority granted by the Federal Power Act;

"(C) The amount of $3,657,080.83, representing the total of all items disallowed, exclusive of $183,396.22, the disallowed part of claimed cost appertaining to water rights at Lock 15, be transferred from the project accounts and charged to the earned surplus account pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts Prescribed for Public Utilities and Licensees;

"(D) The amount of $152,814.31 for organization expenses, the amount of $66,603.78 for the cost of the Mitchell dam portion of the Lock 15 water rights, and the $969.97 for interest, allowed in addition to licensee's original claimed cost shall be charged to the project accounts and the earned surplus account concurrently credited with the total of these items;

"(E) All amounts now carried in the asset accounts as part of the original charges to the cost of the project up to and including December 31, 1925, and not otherwise disposed of by this order, and which do not represent the cost of some physical property other than this project, shall be transferred from such accounts, both control and subsidiary, in which included, and the net amount thereof charged to earned surplus account, pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts;

"(F) Within sixty days of service of this order, the licensee comply with this order and execute and submit to the Commission FPC Form No. 76 showing such compliance."

(1) its accounts, securities, books, rates, and services are all regulated by the Alabama Public Service Commission; (2) the Commission's jurisdiction over the company's accounts is limited to those matters in which it is not subject to regulation by the state Commission; (3) the Commission was without authority to order the disallowed items charged to the company's surplus account; (4) the accounting disposition of the disallowed items was not an issue in this proceeding; (5) the Commission's order deprived the company of its property without due process of law because it denied a hearing with respect to the accounting disposition of the disallowed items; (6) notice and opportunity of hearing is mandatory under the statute; (7) the Commission's order directing the company to show cause in writing under oath why its order should not be made effective does not constitute the hearing to which the company is entitled; (8) the Commission "has considered without notice, condemned without hearing, found without evidence, and rendered judgment without trial."

[2] In Alabama Power Co. v. McNinch,[5] we said, after setting out pertinent sections of the applicable statute: "Under these provisions it is clear that the Commission has authority to determine the actual legitimate original cost of a project and to require the licensee to set up his books showing the cost as thus determined." The Commission relies upon this language as constituting the law of the case and as justifying its order of November 26, 1940, *supra*. That it does constitute the law of the case, in part at least, there is no doubt.[6]

[3, 4] The language of the statute and the clearly stated powers and duties of the Commission leave no doubt that, while a division of authority between it and appropriate state agencies is contemplated,[7] so far as concerns regulation,[8] the Commission is vested with summary and unlimited powers over the accounts of its licensees to the extent necessary to insure proper performance of its duties.[9]

[5] *Supra*, 68 App DC at p. 137, 21 PUR (NS) at p. 231.

[6] Brown v. Gesellschaft (1939) 70 App DC 94, 95, 104 F(2d) 227, 228, certiorari denied (1939) 307 US 640, 83 L ed 1521, 59 S Ct 1038; Davis v. Davis (1938) 68 App DC 240, 243, 96 F(2d) 512, 515, reversed 305 US 32, 83 L ed 26, 59 S Ct 3, 118 ALR 1518; White v. Higgins (1940) 116 F(2d) 312, 317; Toucey v. New York Life Ins. Co. (1940) 112 F(2d) 927, 928, reversed (1941) 314 US 118, 86 L ed —, 62 S Ct 139; Seattle v. Puget Sound Power & Light Co. (1926) 15 F(2d) 794, 795, certiorari denied 269 US 565, 70 L ed 414, 46 S Ct 24.

[7] Safe Harbor Water Power Corp. v. Federal Power Commission (1941) 124 F(2d) 800, 806, 44 PUR(NS) —.

[8] Federal Water Power Act of 1920, 41 Stat. 1063, §§ 4(b) (e), 7, 9(b), 10(e), 14, 19, 20, 22, 27, 16 USCA §§ 797(b, e), 800, 802(b), 803 note, 807 note, 812, 813, 815, 821; Federal Power Act of 1935, 49 Stat. 838, §§ 202(c) (e) (f), 206 (e), 207, 210(b); id., Part II, 49 Stat. 847, §§ 201(a) (b), 202(a) (b), 203(a), 204(f), 206(b), 207, 209(a) (b) (c); id., Part III, 49 Stat. 854, §§ 301(a), 302(a) (b), 306, 307, 308(a), 313(a), 16 USCA §§ 797 (c–f), 803(e), 807, 817(b), 824 (a, b), 824a (b), 824b (a), 824c (f), 824e (b), 824f, 824h (a–c), 825(a), 825a (a, b), 825e, 825f, 825g (a), 825*l*(a).

[9] Federal Water Power Act of 1920, 41 Stat. 1063, as amended by the Federal Power Act of 1935, 49 Stat. 854, 16 USCA § 825, provides, in part: ". . . That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any state. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission

(If the state, in the proper performance of its duties, wishes to require the keeping of a separate set of books, no doubt it can do so.[10] And if the company wishes to keep a third set for its own purposes, there seems to be nothing in the law to prevent it from doing so.[11] But two things are certain: (1) The statute clearly contemplates that the Commission may require the licensee to establish and maintain accounts; (2) the licensee must allow the Commission to have access to all accounts which it does keep.) The Act of 1920 provides, generally, that the Commission shall have power "To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this act as may be necessary and proper for the purpose of carrying out the provisions of this act."[12] Specifically, it provides that: ". . . The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, *accounts, books, records, and all other papers and documents* relating thereto."[13] [Italics supplied.]

It empowers the Commission in express terms and without limitation (1) "To prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof by licensees [t]hereunder"; (2) "to examine all books and accounts of such licenses at any time"; (3) "to require them to submit at such time or times as the Commission may require statements and reports, including full information as to assets and liabilities, capitalization, net investment and reduction thereof, gross receipts, interest due and paid, depreciation and other reserves, cost of project, cost of maintenance and operation of the project, cost of renewals and replacements of the project works, and as to depreciation of the project works and as to production, transmission, use and sale of power; also to require any licensee to make adequate provision for currently determining said costs and other facts."[14] To make its purpose doubly clear, in this respect, the statute provides specifically that: "All such statements and reports shall be made upon oath, unless otherwise specified, and in such form and on such blanks as the Commission may require. Any person who, for the purpose of deceiving, makes or causes to be made any false

shall be on the person making, authorizing, or requiring such entry, . . ." Northern States Power Co. v. Federal Power Commission (1941) 118 F(2d) 141, 144, 39 PUR(NS) 23; Northwestern Electric Co. v. Federal Power Commission (1942) 125 F(2d) 882, 43 PUR(NS) 140.

Cf. Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 US 194, 213, 56 L ed 729, 32 S Ct 436, 440: ". . . the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress . . ."; American Teleph. & Teleg. Co. v. United States (1936) 299 US 232, 237, 81 L ed 142, 16 PUR(NS) 225, 228, 57 S Ct 170, 172: ". . . in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote."; 1 Pike and Fischer, Admin. Law, Current Text, 34c.1-7: ". . . there is little ground for supposing that Congress intended to limit the Federal Power Commission's jurisdiction over accounts to the extent that state regulation exists and is enforced."

[10] Northern States Power Co. v. Federal Power Commission, *supra*, note 9.

[11] Northwestern Electric Co. v. Federal Power Commission, *supra*, note 9.

[12] 41 Stat. 1067, § 4(h), 16 USCA § 797 note.

[13] 41 Stat. 1065, § 4(a), 16 USCA § 797(b).

[14] 41 Stat. 1066, § 4(f), 16 USCA § 797 note.

entry in the books or the accounts of such licensee, and any person who, for the purpose of deceiving, makes or causes to be made any false statement or report in response to a request or order or direction from the Commission for the statements and report herein referred to shall, upon conviction, be fined not more than $2,000 or imprisoned not more than five years or both."[15]

And to make doubly clear the powers of the Commission, generally, the act provides: "That any licensee, or any person, who shall wilfully fail or who shall refuse to comply with any of the provisions of this act, or with any of the conditions made a part of any license issued hereunder, or with any subpœna of the Commission, or with any regulation or lawful order of the Commission, . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall, in the discretion of the court, be punished by a fine of not exceeding $1,000, in addition to other penalties herein prescribed or provided by law; and every month any such licensee or any such person shall remain in default after written notice from the Commission, . . . shall be deemed a new and separate offense punishable as aforesaid."[16]

The company, as a licensee under the 1920 act, took its license with knowledge of the following provision: "Each such license shall be conditioned upon acceptance by the licensee of *all the terms and conditions of this act.* . . ."[17] [Italics supplied.] Hence, it took with full notice of the provisions heretofore set forth.

Moreover, it took with knowledge of the duties of the Commission, performance of which requires not merely full access to the company's accounts, but control of their form and content. Included among those duties are the following: (1) To determine the net investment of the licensee in the project.[18] It is necessary, in order that the Commission may comply with the mandate of the statute, that it (2) shall for this purpose, not merely determine (i) the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," but, also, that it shall ascertain and add thereto (ii) similar costs of additions thereto and betterments thereof, and that it shall ascertain and deduct therefrom (iii) "the sum of the following items *properly allocated thereto,* if and to the extent that such items have been *accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created.*"[19] [Italics supplied.] (3) To require the licensee to establish and maintain depreciation reserves sufficient to insure the maintenance

[15] 41 Stat. 1066, § 4(f), 16 USCA § 797 note.
[16] 41 Stat. 1076, § 25, 16 USCA § 819.
[17] 41 Stat. 1067, § 6, 16 USCA § 799.
[18] 41 Stat. 1065, § 4(a), 16 USCA § 797(b).
[19] 41 Stat. 1064, § 3, 16 USCA § 796.

of the project works in a condition of adequate repair for efficient operation in the development and transmission of power.[20] (4) To require the licensee to establish and maintain amortization reserves out of surplus which may be earned by it, *after the first twenty years of operation,* and accumulated by it in excess of a reasonable rate of return, to be specified by the Commission, upon the actual, legitimate investment of the licensee in the project.[21] (5) To determine, in its discretion, whether such amortization reserves shall be held until the termination of the license or be applied from time to time in reduction of the net investment.[22] (6) To fix the amount of reasonable annual charges which the licensee shall pay to the United States (a) for the purpose of reimbursing the United States for the costs of administering the act; (b) for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and (c) for the expropriation to the government of excessive profits,[23] (7) in fixing the charges specified in (6) the Commission must seek to avoid increasing the price of power to consumers and to this end charges for the expropriation of excessive profits may be adjusted by the Commission, *from time to time, as conditions may require.*[24] (8) To require that any licensee, who may be benefited by the construction work of another licensee, a permittee, or of the United States, of a storage reservoir or other headwater improvement, shall reimburse the owner of such reservoir or other improvements for such part of the *annual charges* for interest, maintenance, and depreciation thereon as the Commission may deem equitable. And for this purpose the statute provides, expressly, that the Commission shall determine the proportion of such *annual charges* which shall be paid by the licensee.[25] (9) To fix the just and fair compensation which shall be paid by the United States for the use of any project taken over by the United States, when in the opinion of the President of the United States the safety of the country demands such taking. The Commission is charged to fix such compensation upon the basis of a reasonable profit in time of peace, and the cost of restoring the property to as good condition as existed at the time of taking, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.[26] (10) To regulate and control so much of the services rendered by the licensee, and of the rates and charges of payment therefor as constitute interstate or foreign commerce.[27]

The statute not merely requires the Commission to perform these and other similar duties[28] but specifies expressly that all licenses issued under the act shall be conditioned upon compliance,

[20] 41 Stat. 1069, § 10(c), 16 USCA § 803(c).
[21] 41 Stat. 1069, § 10(d), 16 USCA § 803(d).
[22] Ibid.
[23] 41 Stat. 1069, § 10(e), 16 USCA § 803(e).
[24] Ibid.
[25] 41 Stat. 1070, § 10(f), 16 USCA § 803(f).
[26] 41 Stat. 1072, § 16, 16 USCA § 809.
[27] 41 Stat. 1073–1074, § 20, 16 USCA § 813.
[28] See 41 Stat. 1070, 1071, 1072, 1073, 1074, 1076, §§ 11, 12, 14, 20, 26, 16 USCA §§ 804, 805, 807, 813, 820. Section 26 of the 1920 Act provides for the institution, by the Attorney General, of proceedings in equity for the purpose of revoking any license issued under the act because of the violation of its terms "or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this act [title] or of any lawful regulation or order promulgated hereunder."

by the licensee, with the requirements set out in (3), (4), (5), (6), (7), (8).[29] In addition, the statute specifies that the Commission may impose such further conditions not inconsistent with its provisions, as the Commission may require.[30]

The rules and regulations of the Commission were attached to, and made a part of, the license which was issued to the company. These included a regulation that the licensee should "conform to such rules and regulations *as may be prescribed by the Commission from time to time* for the establishment and maintenance of a system of accounts and for the keeping and preserving of such books, records, and memoranda pertaining to the project and the project accounts as may be required by the Commission."[31] [Italics supplied.] They included, also, the following: "The Commission reserves to itself the right to investigate and make any lawful order concerning any item or amount included in the cost of the original project or of any addition thereto or betterment thereof, whether such cost is incurred by the licensee during the period of the license, or by a permittee or other person natural or artificial prior to the issuing of a license under the act."[32]

[5, 6] Not only is it clearly apparent, therefore, that the Commission had full power to require accounting disposition of all items here in dispute, but it seems inescapable that accounting disposition of all was at issue from the very beginning of the proceedings here under review. Unless accounting disposition had been contemplated for the purposes of the statute, the inquiry would have been without meaning. The company received its license with full knowledge that the law required it to coöperate with the Commission to the ends therein stated. It is impossible to read the statute without realizing the necessity of ascertaining and making accounting disposition of all items which the licensee put in issue. "The grant of a license, being a privilege from the sovereign, can be justified only on the theory of resulting benefit to the public. The act, therefore, should receive a practical construction,—one enabling the Commission to perform facilely the duties required of it by Congress."[33] Every step in the proceedings and in the negotiations taken by the Commission has been for the purpose of establishing an accounting basis upon which it could perform its duties with respect to the licensee and to the public.[34] This is precisely that regulation

[29] 41 Stat. 1068, § 10, 16 USCA § 803.

[30] 41 Stat. 1070, § 10(g), 16 USCA § 803(g).

[31] Regulation 20, Accounts and Reports, as amended June 6, 1921, § 1.

[32] Id. at § 6.

[33] Northern States Power Co. v. Federal Power Commission (1940) 118 F(2d) 141, 144, 39 PUR(NS) 23, 26, and authorities there cited.

[34] The company's initial cost statement was filed with the Commission on March 29, 1930. On May 31, 1930, the Commission's accounting staff submitted a preliminary accounting report proposing numerous eliminations from and some additions to the company's initial cost statement. On September 6, 1930, the company submitted a protest to the preliminary accounting report and denied the authority or power of the Commission to take any binding action on the preliminary accounting report or to modify, alter, or in any way change the company's initial cost statement, or to make any order based on such change. After hearings in December, 1931, and pursuant to the direction contained in the Commission's opinion dated June 30, 1932, 1 Fed PC 25, PUR 1932 D 345, an order was entered on November 9, 1932, directing the entry of allowed legitimate original cost in the company's fixed capital accounts with appropriate corrective entries in subsidiary ledgers. In the proceedings in the district court in 1936, in the case of Ala-

which is contemplated by the act.[35] Such an accounting basis should have been established, for the present licensee, years ago. This is evidenced by the fact that the company's license has been in effect for over twenty years and, pursuant to the terms of the statute—as one of its duties, listed on an earlier page—the Commission must now determine, for inclusion in the amortization reserve required by § 10 (d) of the act,[36] surplus earned thereafter and accumulated in excess of the reasonable rate of return specified in the license. "There must be a limit to individual argument in such matters if government is to go on." [37]

We come now to the actual disposition, ordered by the Commission, to be made of the disallowed items. Judicial power in reviewing this matter is defined by the Supreme Court as follows: "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' (Kansas City S. R. Co. v. United States [1913] 231 US 423, 444, 58 L ed 296, 34 S Ct 125, 131, 52 LRA(NS) 1) as to be the expression of a whim rather than an exercise of judgment. Norfolk & W. R. Co. v. United States (1932) 287 US 134, 141, 77 L ed 218, 53 S Ct 52, 54; Kansas City S. R. Co. v. United States, *supra,* 231 US at p. 456. Then, too in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote. 'The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction.' Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 US 194, 211, 56 L ed 729, 32 S Ct 436, 439; cf. Kansas City S. R. Co. v. United States, *supra,* 231 US at p. 445." [38] With these instructions in mind we

bama Power Co. v. McNinch, reversed on appeal (1937) 68 App DC 132, 21 PUR(NS) 225, 94 F(2d) 601, the company introduced testimony as to the cost of making the corrective ledger entries. After hearings subsequent to the remand of the case by this court to the Commission, the latter entered the order of November 26, 1940, 37 PUR(NS) 35, supplementing that of December 19, 1932, 1 Fed PC 62, and directing entry of the allowed legitimate original cost in the fixed capital accounts, with appropriate entries in subsidiary ledgers. The order further directed the company to charge disallowed cost to earned surplus. The scope of the issues involved is stated by Commissioner Smith, concurring in the opinion of the Commission dated June 30, 1932, *supra,* where he stated that the company was questioning the power of the Commission *"to require . . . [petitioner] to omit from its capital accounts any item of cost therein."*

[35] Northern States Power Co. v. Federal Power Commission, *supra,* note 33.

[36] Federal Water Power Act of 1920, 41 Stat 1069, 16 USCA § 803(d).

[37] Bi-Metallic Investment Co. v. State Board of Equalization (1915) 239 US 441, 445, 60 L ed 372, 36 S Ct 141, 142.

[38] American Teleph. & Teleg. Co. v. United States (1936) 299 US 232, 236, 237, 81 L ed 142, 16 PUR(NS) 225, 228, 57 S Ct 170, 172. Cf. Northwestern Electric Co. v. Federal Power Commission (1942) 125 F(2d) 882, 885, 43 PUR(NS) 140, 145: "There is noth-

proceed to consider the company's objections to the proposed accounting.

[7] Specifically, the company expresses apprehension that if it were required to comply with the Commission's order, it would, as a result, be deprived of a judicial determination of value, when and if the government institutes recapture proceedings. The apprehension is ill-founded. What effect is to be given, in future recapture proceedings, to the Commission's determination of actual legitimate original cost is not now before this court.[39] If petitioner should be foreclosed from reopening that question, it will be because the Power Act so provides;[40] not because the accounting entries presently enjoined upon it are conclusive as to the value of the property.[41] Whatever effect the present determination may be given in recapture proceedings, the Commission is clearly authorized to determine such cost without waiting for the occurrence of such a contingency.[42] The power to direct that the company's books shall properly reflect its determination merely carries that proceeding to completion.[43] No reason is apparent why the exercise of the power to direct particular accounting entries,[44] any more than the power to determine original cost, should be deferred to some remote time when recapture proceedings may be initiated. Petitioner overlooks the extensive and continuing regulatory power which the Commission is required to exercise.[45]

[8–10] The company contends, further, that if the Commission's order for accounting disposition of the disallowed items is imposed upon it, the result will be to prevent it from capitalizing its actual assets. It urges in support of its contention (1) that the law of Alabama permits capitalization upon a basis of *reasonable value*,

ing in the act which authorizes us to determine what is necessary or appropriate for purposes of administration of the act. The duty to make such a determination is imposed by the statute on respondent. After such determination, the only question which may be presented to us is one of law. The question of law has been expressed in various words, such as: . . . All these expressions lead to one conclusion, which is: could any reasonable man take the view announced by the Commission? If he could, then the action of the Commission must be sustained." 1 Pike and Fischer, Admin. Law, Current Text, § 34c.1.

[39] Cf. Montana Power Co. v. Federal Power Commission (1940) 112 F(2d) 371, 374, 35 PUR(NS) 187.

[40] Federal Water Power Act of 1920, § 14, 41 Stat 1071, as amended by the Federal Power Act of 1935, 49 Stat 844, 16 USCA § 807: ". . . before taking possession it [the United States] shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, ... The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. . . ; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: . . ."

[41] Kansas State Corp. Commission v. Wichita Gas Co. (1934) 290 US 561, 569, 78 L ed 500, 1 PUR(NS) 433, 54 S Ct 321; Norfolk & W. R. v. United States (1932) 287 US 134, 142, 77 L ed 218, 53 S Ct 52, 54: ". . . the mere accounting classification can conclude neither the Commission nor the appellant upon the hearing of an application under § 20a(2) [49 USCA § 20a(2)]" Kripke, Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation, 50 Yale LJ 1180, 1190, 1203; 1 Pike and Fischer, Admin. Law, Current Text, 34c1–8.

[42] Clarion River Power Co. v. Smith, 61 App DC 186, 188, PUR1932E 149, 59 F(2d) 861, 863, certiorari denied, 287 US 639, 77 L ed 553, 53 S Ct 88.

[43] Northern States Power Co. v. Federal Power Commission (1941) 118 F(2d) 141, 144, 39 PUR(NS) 23.

[44] Federal Power Act of 1935, Part III, 49 Stat 854, 16 USCA § 825(a): ". . . The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited."

[45] Clarion River Power Co. v. Smith, *supra*, note 42.

as distinguished from actual original cost;[46] (2) that the law of Alabama permits increased capitalization on increased value of accumulated (already held) property;[47] (3) that it, the present consolidated company, was formed in 1927 and at that time paid to the then existing licensees a consideration equivalent to the amount which such licensees carried on their books as the costs of those properties; (4) hence, that, whether or not the Commission correctly determined the actual, legitimate original cost as of 1913, the items rejected by the Commission constituted a "true increment of value" which the Commission is without power to order written off. (5) It contends, generally, in this connection that the Commission exceeded the bounds of its administrative powers and deprived it of due process by refusing to give notice and hearing concerning the propriety of transferring the disallowed items from one account to another.

As for the first two points, it must be observed that it is the Federal Power Act[48] and not the law of Alabama which declares the standards which the Commission must use in performing its duties. That act does not direct the Commission to find *reasonable value* or *actual assets*, but, instead, it directs that it first determine the actual, legitimate original cost.[49] The present proceeding was directed to that end. Thereafter, the act directs the Commission to determine a number of other items—none of which are called *reasonable value* or *actual assets*—and which, when determined will, presumably, then be reflected in appropriate accounts. As for the third point, the fact that the company—which received its license in 1931—carried on transactions with the earlier licensees in 1927, gives it no preferred standing over the earlier licensees, and in no way affects the actual legitimate original cost. The important fact is that it received its license by transfer, subject to its acceptance of all the terms and conditions of the Federal Water Power Act and of the further conditions imposed by the Commission.

[11–13] In support of its fourth point—that the Commission's order requires it to write off items which constitute a true increment of value, thus preventing it from capitalizing its actual assets[50]—the company relies upon certain language of the Supreme Court

[46] State ex rel. White v. Citizens Light & P. Co. (1912) 172 Ala 232, 236, 237, 55 So 193, 194, 195; Clinton Mining & Mineral Co. v. Jamison (1919) 256 Fed 577, 579, 580.

[47] See Fitzpatrick v. Dispatch Publishing Co. (1887) 83 Ala 604, 607, 2 So 727.

[48] Federal Water Power Act of 1920, 41 Stat 1065, as amended by the Federal Power Act of 1935, 49 Stat 839, 16 USCA § 797(b).

[49] Cf. Northwestern Electric Co. v. Federal Power Commission, *supra*, note 38.

[50] The company asserts that compliance with the Commission's order will be greatly prejudicial "by compelling petitioner to show to the consumer, the public, and regulatory bodies, a false and low value on its properties," that an understatement of surplus will "repel investors and depreciate the real value of the securities held by present investors" and tends "to prevent the declaration of dividends out of funds properly available for the same."

Cf. Kansas City S. R. Co. v. United States, *supra*, 231 US at pp. 453, 455, 456: "Supposing, however, that the enforcement of the accounting system does require [the preferred stockholders] to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property.

. . . . . .

". . . of the argument that enforcement of the regulations will impair the credit of appellant by diminishing apparent earnings, preventing continuance of dividends upon preferred stock, and keeping down the aggregate value of 'assets' upon the property accounts. Presumably the regulations have a tendency to place the accounting system upon a sound basis in these respects; and to accomplish this

in American Teleph. & Teleg. Co. v. United States, concerning a requirement of the Federal Communications Commission that "'the amounts recorded in this account with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct.'"[51] The Supreme Court said, if the foregoing language meant that the difference between original cost and present cost was not to be reckoned, either wholly or in part, as a statement of existing assets, but must be written off completely, on the theory that the Commission was charged with a mandatory duty to extinguish the entire balance because its presence under the title of "investments" was supposed to have the effect of a misleading label, then there would be force in the contention that the effect of the order was to distort in an arbitrary fashion the value of the assets.[52] But the court accepted, as a binding administrative construction, as to the meaning of the quoted language, the declaration of an Assistant Attorney General as follows: ". . . 'that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired: and, in accordance with paragraph (C) of Account 100.4, provision will be made for their amortization.'"[53] And the court distinguished the New York Edison Company Case,[54] "where under rules prescribed by the Public Service Commission of New York, there was an inflexible requirement that an account similar in some aspects to 100.4 be written off in its entirety out of surplus, whether the value there recorded was genuine or false."[55] The court said that an item included in the adjustment account is thereby classified "as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment."[56] And, it concluded, "The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment."[57] The company argues from this that, in the present case, the purpose of the Commission's order is to achieve exactly the result which was, by implication at least, forbidden by the Supreme Court in the Telephone Company Case, i. e., to withdraw from recognition as a legitimate investment and destroy as an asset the difference between present value and original cost, whether the value thereof was true or false.

It is very doubtful whether an analogy can properly be drawn between the present case and the Telephone

was one of the legitimate objects at which Congress aimed in the enactment of § 20 of the interstate commerce act [49 USCA § 20]."

[51] *Supra*, note 38.

[52] Id.

[53] American Teleph. and Teleg. Co. v. United States, *supra*. 299 US at p. 241, 16 PUR (NS) at p. 231.

[54] New York Edison Co. v. Maltbie (1935) 244 App Div 685, 9 PUR(NS) 155, 281 NY Supp 223; Id. (1936) 271 NY 103, 15 PUR(NS) 143, 2 NE(2d) 277.

[55] American Teleph. & Teleg. Co. v. United States, *supra*, 299 US at p. 241, 16 PUR(NS) at p. 231.

[56] Id.

[57] Id.

Company Case, or between the powers of the Communications Commission, when it acts to prescribe a system of accounting for the telephone companies, and the power Commission when it acts with regard to the accounting systems of its licensees. The telephone companies are not licensees. The difference between their status and that of the radio broadcasting companies—which *are* licensees—is clearly drawn in the Communications Act.[58] It is not necessary to determine, for the purposes of this decision, whether the rights of the Power Commission's licensees are as unsubstantial as those of the radio broadcasting companies.[59] That they are by no means so substantial as those of the telephone companies and other carriers seems clear.[60]

The powers of the Federal Power Commission over licensees, like those of the Federal Communications Commission over its licensed radio broadcasters, are "comprehensive and inclusive."[61] Nor is the reason far to seek. In granting the privilege of exploiting the water resources of navigable streams, or the channels of radio communication, the Federal government is making grants out of its exclusive domain.[62] Aside from statute, there is no right to engage in such activity.[63] The grant of such privileges may be made subject to conditions appropriate to safeguard the interest of the public.[64] Having received its license subject to such conditions, and enjoying such privileges as it does, subject to the severe limitations imposed by the statute,[65] the company cannot shuck off its obligations as a licensee and set itself up in another capacity, or avoid the comprehensive and inclusive powers of the Commission.

The attempted analogy is, apparently, based upon a misconception of the different formulae prescribed by the Water Power Act for valuation of the properties of (1) licensees of the Federal Power Commission and (2) other public utilities subject to its control; as well as a misconception of the different formulae prescribed by the Communications Act. In making valuations of the property of common carriers—as distinguished from its radio broadcasting licensees—the Communications Commission is governed by entirely different provisions of the statute[66] and is required to give consideration to other elements of value than those of original cost.[67] And the

[58] 48 Stat 1066, § 3(h), 47 USCA § 153(h). Sections 201 to 221(d), 48 Stat 1070–1081, 47 USCA §§ 201–221(d), are devoted to the regulation of common carriers in matters of rates, services, practices, etc. Sections 301 to 329, 48 Stat 1081–1092, as amended by the Act of May 20, 1937, 50 Stat 191–197, §§ 6 to 10(b), 47 USCA §§ 301–362(b), are special provisions relating to radio. See Yankee Network v. Federal Communications Commission (1939) 71 App DC 11, 20, 107 F(2d) 212, 221.

[59] Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 US 470, 475, 476, 84 L ed 869, 33 PUR(NS) 135, 60 S Ct 693; Yankee Network v. Federal Communications Commission, *supra*, note 58.

[60] See notes 17, 21–32, inclusive, *supra*.

[61] Yankee Network v. Federal Communications Commission, *supra*, note 58.

[62] Blachly and Oatman, Federal Regulatory Action and Control (1940) 16.

[63] Yankee Network v. Federal Communications Commission, *supra*, note 58.

[64] Newport & C. Bridge Co. v. United States (1882) 105 US 470, 479, 482, 26 L ed 1143; United States v. Appalachian Electric Power Co. (1940) 311 US 377, 427, 428, 85 L ed 243, 36 PUR(NS) 129, 61 S Ct 291; Pennsylvania Water & Power Co. v. Federal Power Commission (1941) — App DC —, 123 F(2d) 155, 163, certiorari denied (1942) — US —, 86 L ed —, 62 S Ct 640.

[65] See notes 17 to 32, inclusive, *supra*.

[66] See note 58 *supra*.

[67] E. g., the carriers must submit estimates

Power Commission, in making valuations for purposes of rate regulation of public utilities—not its licensees—is governed, also, by a different formula than when it makes valuations of the property of a licensee. The formula for valuation of properties of licensees, for rate-making purposes, is contained in the provisions of sections of the 1920 Act,[68] which were incorporated into Part I of the Federal Power Act of 1935.[69] Part II of the Power Act[70] is that which deals with public utilities subject to the control of the Federal Power Commission, by reason of being engaged in distribution of electric power in interstate commerce. The formula of valuation there prescribed, for purposes of rate regulation, provides that the Commission may ascertain the actual legitimate original cost of such utilities and *"when found necessary* for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property."[71] [Italics supplied.] It will be seen that this formula gives due consideration to the constitutional doctrine of "fair value," *when found necessary.*[72] In the present case, therefore, the Commission observed the formula prescribed by the statute and valued the properties of its licensee at "actual legitimate original cost." It was not required to consider other elements of value in doing so, as it might have been if it had been engaged in a valuation of the properties of public utilities which are subject to its control under Part II of the act; and as the Communications Commission was required to do in prescribing the system of accounts which was challenged in the Telephone Case.

Moreover, the attack which was made upon the order of the Communications Commission in the Telephone Case challenged, not the power of that Commission to prescribe a general system of accounting, but the effect of the general system there prescribed, in distorting, as was claimed, the capital assets of the affected companies, and by leaving uncertain and undetermined the character of certain disputed items in an *adjustment* account. In the present case the only attack which is made upon the general system of accounting prescribed by the Commission is that the Power Commission is without power to prescribe *any* general system of accounting for the appellant company except one which conforms to the company's ideas of an appropriate system of accounting under the 1920 Act. This contention, as we have already shown, is entirely without merit.[73] The specific attack of the present case—entirely unlike that of the Telephone Case—is upon the Commission's order re-

of reproduction cost. Communications Act of 1934, 48 Stat 1074, 47 USCA § 213(b); American Teleph. & Teleg. Co. v. United States (1936) 299 US 232, 240, 81 L ed 142, 16 PUR(NS) 225, 57 S Ct 170.

[68] See 41 Stat 1074, 1071, 1064, 16 USCA §§ 813, 807, 796; Alabama Power Co. v. McNinch (1937) 68 App DC 132, 137, 21 PUR (NS) 225, 94 F(2d) 601, 606.

[69] 49 Stat 847, § 212, 16 USCA § 797 note.

[70] 49 Stat 847–854, 16 USCA §§ 824–824h.

[71] 49 Stat 853, § 208(a), 16 USCA § 824g (a).

[72] See Federal Power Commission v. Natural Gas Pipeline Co. (1942) — US —, 86 L ed —, 42 PUR(NS) 129, 62 S Ct 736, and the concurring opinion of Justices Black, Douglas and Murphy. See the concurring opinion of Justice Frankfurter, in Driscoll v. Edison Light & P. Co. (1939) 307 US 104, 122, 83 L ed 1134, 28 PUR(NS) 65, 59 S Ct 715.

[73] See notes 17, 29–32, inclusive, *supra.*

quiring that certain disputed and adjudicated items shall be transferred from one account to another account of the uniform system of accounts prescribed by the Power Commission for all its licensees.

And, finally, as indicating the lack of a valid analogy, is the fact that the telephone companies are forbidden to keep other accounts than those prescribed by the Communications Commission;[74] while power company licensees must comply, in addition, with the accounting requirements of states to which they may be subject;[75] and there appears to be no limitation upon their power to keep such other subsidiary and explanatory accounts as they may wish.[76]

Even if we were to assume, for the purpose of argument, however, the validity of the suggested analogy, still the situation existing in the present case is so far different as to make completely inapplicable the language of the Supreme Court's decision in the Telephone Case, upon which the present appellant relies. The contested order of the Federal Power Commission requires that the total of all disallowed items "be transferred from the *project account* and charged to the earned surplus account. . . ." [Italics supplied.] Full, elaborate and long-continued hearings were held by the Commission concerning these items. As to each of them the Commission has held that they do not constitute *actual legitimate* cost. As to each of them we have upheld the Commission's determination. Consequently, the supposed value of the items has been determined to be false rather than genuine; the investigation and determination made by the Commission, and upheld by this court, shows that the treatment ordered by the Commission is proper; there is no distortion of the value of assets. In this connection the following language of the Supreme Court in the Telephone Case should be noted: "We are not impressed by the argument that the classification is to be viewed as arbitrary because the fate of any item, its ultimate disposition, remains in some degree uncertain until the Commission has given particular directions with reference thereto."[77] In the present case the Commission has given particular directions with reference to the disputed items; there is no uncertainty; no reason for further inquiry; no further question to be determined concerning them.[78]

Obviously, the Commission was acting within the scope of its authority and properly performing its adminis-

[74] Communications Act of 1934, 48 Stat 1079, 47 USCA § 220(g).

[75] Federal Power Act of 1935, 49 Stat 854, 16 USCA § 825(a); Northwestern Electric Co. v. Federal Power Commission (1942) 125 F(2d) 882, 43 PUR(NS) 140.

[76] Differences in comparable statutes cannot be assumed to be without design. Cudahy Packing Co. v. Holland (1942) — US —, 86 L ed —, 62 S Ct 651.

[77] American Teleph. & Teleg. Co. v. United States, *supra*, 299 US at p. 242, 16 PUR(NS) at p. 231.

[78] Cf. American Teleph. & Teleg. Co. v. United States, 299 US at p. 244, 16 PUR (NS) at p. 233: "But one of the very reasons for establishing that account is that in advance of inquiry by the Commission as to the property there included it is impracticable to determine what portion of it may properly be subjected to charges of this nature. When that inquiry has been completed, the Commission will be in possession of the necessary data. Provision will then be made for amortization of any amounts in the account that may properly be classified as investment in depreciable property. The label is unimportant, whether depreciation or amortization, if the substance of allowance is adequately preserved."

trative duty when it required the company to remove the disallowed items from the project account. Where, then, shall they be put? The Commission says, in the earned surplus account. The company has been unable to suggest any other. In its order of November 9, 1932, the Commission directed its licensee, the company, to establish and maintain control and subsidiary ledger sheets or accounts showing a total debit balance in its fixed capital accounts beginning with an entry of $7,098,512.51 as the actual legitimate original cost of the project. In December, 1932, 1 Fed PC 62, it modified its earlier order, reducing slightly the amount fixed for actual legitimate original cost; expressly disallowed the amount of the other claimed items and extended the time for compliance with its earlier order, to establish and maintain accounts. Then followed a long period of extensions of time for compliance, the first appeal to this court, the further hearing held by the Commission in compliance with the decision of this court,[79] and, finally, the order of November 26, 1940, 37 PUR (NS) 35, complained of on this appeal. The company had several years in which to set up accounts which would conform, at least in part and in principle, with the Commission's determination. Instead, it contends that it was ignorant of any duty to make accounting disposition of the disallowed items and that accounting disposition was not in issue. On December 21, 1940, it requested further delay and a further hearing "to adduce evidence with respect to the proper accounting practice . . . ." With commendable patience, in view of the twenty years which had elapsed since the license was first granted, the Commission then, by its order of January 21, 1941, gave opportunity to its licensee to "show cause in writing, under oath, why the accounting instructions and requirements . . . [of its orders of the preceding November and December] should not be made effective and enforced, and . . . submit to the Commission *such accounting treatment as the licensee may propose* for the disposition of disallowed items of claimed cost; . . ." [Italics supplied.] Instead of accepting the invitation thus extended by the Commission—in response to its own request for such an opportunity—the licensee replied that (1) accounting disposition of the disallowed items was *"not an issue in this proceeding"*; [Italics supplied] (2) the Commission is without authority to provide for accounting disposition of the disallowed items; and (3) finally, "licensee respectfully submits that it cannot propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission." Thereafter, on April 26, 1941, the Commission found that the company had not shown cause why the accounting requirements of its November 26, 1940 order, *supra*, concerning the disallowed items, should not be made effective; it found that the company had not proffered any testimony or evidence, or submitted any accounting treatment, for the disposition of disallowed items of claimed cost; wherefore it directed compliance with its earlier order of November 26, 1940. The company's peti-

[79] Alabama Power Co. v. McNinch (1937) 68 App DC 132, 21 PUR(NS) 225, 94 F(2d) 601.

tion for rehearing of the April 26, 1941 order was also denied by the Commission.

[14] It is apparent, therefore, that the company has been afforded every reasonable opportunity to present an issue upon the question, to be heard thereon, and to discharge the burden of proof which the statute imposes upon it of justifying any accounting entry which it chooses to make.[80] Instead, it chose to challenge the indisputable powers of the Commission; it not only failed to take advantage of the various opportunities, and to shoulder its burden, but stated its inability and unwillingness to do so. Consequently, it has foregone the opportunity to question the propriety of the order.[81] Certainly, there was, thereafter, no reason for granting a further hearing or for further delaying a disposition of this matter which should have been made years before. Nor is there any warrant for the procedure suggested by the company of splitting this administrative proceeding into a series of successive hearings and decisions.[82]

Under these circumstances, it is clearly sufficient, as against the company's protest, that the disallowed items shall find lodgment in the account specified by the Commission. "A system of accounts may be awkward or imperfect, and yet not so 'arbitrary and outrageous' . . . as to justify a court in restraining its enforcement." [83] After all, the Commission has many duties to perform, over a long period of time,[84] other than coaxing a reluctant licensee to act as the law requires that it shall act.

It will be time enough to consider other phases of appellant's financial problems [85] when it has recognized its existence as a licensee and complied with the preliminary orders of that Commission, which is charged with its regulation. When it has distributed the disputed items in such manner as to reflect accurately the actual original legitimate cost of construction of its project, there will be some basis

[80] Federal Power Act of 1935, 49 Stat 854, 16 USCA § 825(a): "The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof."

[81] National Labor Relations Board v. Jones & L. Steel Corp. (1937) 301 US 1, 47, 81 L ed 893, 57 S Ct 615, 108 ALR 1352; Smith v. Hitchcock (1912) 226 US 53, 61, 57 L ed 119, 33 S Ct 6; Norwegian Nitrogen Products Co. v. United States (1933) 288 US 294, 324, 77 L ed 796, 53 S Ct 350, 361: "This attitude of obstruction is not to be ignored in determining whether the information to be imparted to the petitioner was curtailed by the Commission in any arbitrary way. One who seeks equity must do it."

[82] Cf. Opp Cotton Mills v. Administrator of Wage & Hour Division (1941) 312 US 126, 152, 153, 85 L ed 624; 61 S Ct 524, 536: "The demands of due process do not require a hearing, at the initial stage or at any particular point or *at more than one point* in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." [Italics supplied.]

Cf. National Labor Relations Board v. Mackay Radio & Teleg. Co. (1938) 304 US 333, 350, 351, 82 L ed 1381, 58 S Ct 904, 913: ". . . the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. . . . The contention that the respondent was denied a full and adequate hearing must be rejected."

[83] American Teleph. & Teleg. Co. v. United States, *supra*, 299 US at p. 243, 16 PUR(NS at p. 232,

[84] Clarion River Power Co. v. Smith, 61 App DC 186, 188, PUR1932E 149, 59 F(2d) 861, 863, certiorari denied 287 US 639, 77 L ed 553, 53 S Ct 88.

[85] Cf. Kansas City S. R. Co. v. United States (1913) 231 US 423, 455, 456, 58 L ed 296, 34 S Ct 125, 52 LRA(NS) 1.

upon which to proceed in making other determinations and other appropriate entries, as contemplated by the statute.

There is no showing that the Commission overstepped the bounds of its administrative powers or that its orders are entirely or in any wise "at odds with fundamental principles of correct accounting . . . ." [86] On the contrary, there has been no suggestion of any possible alternative to that proposed by the Commission, although the opportunity to do so has been long open. There has been no denial of due process; no lack of notice; no deprivation of fair hearing; and no action by the Commission which was not entirely within its jurisdiction and the scope of its duty as imposed by the statute.

Affirmed.

[86] Id. 231 US at p. 444; American Teleph. & Teleg. Co. v. United States, *supra*, 299 US at p. 236, 16 PUR(NS) at p. 228.

SECURITIES AND EXCHANGE COMMISSION

Re The Commonwealth & Southern Corporation

[File No. 59-20, Release No. 3432.]

Intercorporate relations, § 19.7 — Simplification of holding company system — Corporate structure — Classes of stock.

1. A holding company's corporate structure unduly complicates the structure of the holding company system within the meaning of § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), where the company has, in addition to a small debt, a large amount of preferred stock outstanding with substantial amount of dividends in arrears and has for a long period been unable to pay dividends on common stock; where its assets consist almost entirely of common stocks of subsidiaries, themselves having large amounts of debt and preferred stocks outstanding; and where entire control of the system is vested in holders of the company's common stock as a class representing 2.77 per cent of the system's property base and 14.31 per cent of consolidated capitalization and surplus, while preferred stock as a class has no effective voting power and represents over 20 per cent of such base and 17.86 per cent of consolidated capitalization and surplus, p. 221.

Corporations, § 18 — Distribution of voting power — Preferred and common stockholders — Holding companies.

2. Voting power is unfairly distributed among security holders when the entire control of a holding company system is vested in holders of the holding company's common stock as a class representing 2.77 per cent of the system's property base and 14.31 per cent of consolidated capitalization and surplus, while preferred stock as a class has no effective voting power but represents over 20 per cent of such base and 17.86 per cent of consolidated capitalization and surplus, the common stockholders exerting control through "dispropor-

tionately small investment" within the meaning of § 1(b) (3) of the Holding Company Act, 15 USCA § 79a (b) (3), p. 221.

Security issues, § 96 — Common stock basis — Recapitalization of holding company.

3. Only common stock should be permitted in a readjustment of a holding company's corporate structure to comply with § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), where the debt and preferred stocks of subsidiaries plus debt of the holding company exceeds 77 per cent of the system's property base, where assets of the holding company consist almost entirely of common stocks of subsidiaries which themselves have large amounts of debt and preferred stocks outstanding, and where corporate revenues of the holding company are almost entirely dependent on receipt of dividends on such common stock; provided, however, that the holding company's bank debt, payable in semiannual instalments, may continue to be liquidated according to its terms, p. 232.

Intercorporate relations, § 19.8 — Simplification of holding company system — Order for recapitalization.

4. The legislative mandate in § 11(b) of the Holding Company Act, 15 USCA § 79k, makes it the duty of the Commission to issue an order as soon as practicable compelling compliance with the act, even though a voluntary plan of recapitalization has been filed in answer to proceedings already commenced under both §§ 11(b) (1) and 11(b) (2); and such order is not necessarily inconsistent with a voluntary plan specifying methods of compliance, p. 232.

Intercorporate relations, § 19.8 — Simplification of holding company system — Effect of preliminary order.

5. Issuance of an order outlining the general objectives to be obtained in proceedings instituted under §§ 11(b) (1) and 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (1) (2), does not involve the fairness or efficacy of any specific plan and may be issued before consideration of any such plan; and questions of fairness and efficacy are more logically considered and determined by the Commission thereafter in passing upon specific plans, after hearings held for such purposes, p. 232.

Intercorporate relations, § 19.8 — Simplification of holding company system — Consolidation of proceedings.

6. Proceedings under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2) relating to recapitalization to being about a proper structure of the holding company system and a fair distribution of voting power, may properly be consolidated with a collateral proceeding under § 11(b) (1), relating to integration of systems, for the purpose of considering plans and other matters as may come within the scope of the hearing, in order to save time, effort, and expense, p. 232.

Intercorporate relations, § 19.8 — Simplification of holding company system — Notice to stockholders.

7. Individual notice need not be given to stockholders of a holding company in a proceeding under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), relating to corporate simplification, where notice has been duly served on the respondent holding company, published in the Federal Register, and circulated by the Commission's public release system, widespread publicity regarding the proceeding also having been given by the company in its annual report sent to all stockholders of record, p. 244.

Intercorporate relations, § 19.8 — Simplification of holding company system — Stockholders as parties.

8. Stockholders of a holding company need not be made parties to a proceeding instituted under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), relating to the question of complication of the structure of the holding company system, distribution of voting power, and the corporate structure of the company, p. 244.

Intercorporate relations, § 19.8 — Simplification of holding company system — Evidence — Value of assets — Prospective earnings.

9. Evidence as to the value of holding company assets and outstanding classes of stock and as to the amount of prospective earnings is not relevant or material to issues raised by an order to show cause in a proceeding under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), in solving the question whether the company's corporate structure should be reduced to a common stock basis, since in such a proceeding the historical data supplied from the company's books and records are a proper and sufficient basis for an order to that end, p. 245.

Intercorporate relations, § 19.7 — Simplification of holding company system — Corporate structure — Structure of system — Voting power.

Statement that the primary issue in a proceeding under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), is not whether the corporate structure of the holding company itself is unduly or unnecessarily complicated by reason of the number of its outstanding classes of securities but that the issue is whether such corporate structure unduly or unnecessarily complicates the structure of the holding company system as a whole or unfairly or inequitably distributes voting power among security holders of such system, p. 231.

Intercorporate relations, § 19.7 — Simplification of holding company system — Plan in connection with integration proceeding.

Discussion of plan submitted in a proceeding under § 11(b) (2) of the Holding Company Act, 15 USCA § 79k (b) (2), which relates to both such proceeding and a proceeding under § 11(b) (1), being a plan which may or may not be suitable as a step towards bringing the operations and corporate structure of the holding company system into compliance with the requirements of § 11(b), and consideration of its relevancy to the question of compliance with § 11(b) (2), p. 233.

Security issues, § 96 — Vested rights — Existing classes of stock.

Discussion of the question whether the "lawfully vested rights" of existing classes of stock make a preferred stock necessary in a holding company's capital structure, p. 235.

Security issues, § 96 — Requirements of Holding Company Act — Preferred stock.

Observation by Securities and Exchange Commission that § 7(d) (1) of the Holding Company Act, 15 USCA § 79g (d) (1), requires consideration of whether or not a preferred stock would be "reasonably adapted" not only to a holding company's own security structure but also to the security structures of the other companies in the system, and that § 7(d) (3) requires consideration of whether or not such a preferred stock woud be "necessary or appropriate to the economical and efficient operation" of the holding company's business as a holding company or the business of the system in which it has an interest, p. 237.

Intercorporate relations, § 19.8 — Simplification of holding company system — Voluntary action — Commission order.

Discussion of the question whether an "in terrorem order," so-called, under § 11(b) (2), 15 USCA § 79k (b) (2), should be issued by the Securities and Exchange Commission where a respondent holding company is attempting to comply with § 11 voluntarily, and statement of principle that the filing of a voluntary plan does not preclude the Commission from taking appropriate action in line with its mandatory duties under § 11(b) (2), p. 243.

[April 9, 1942.]

PROCEEDING *initiated by order of Securities and Exchange Commission pursuant to § 11(b) (2) of the Holding Company Act; change of capitalization to one class of stock, namely, common stock, ordered and proceedings under §§ 11(b) (1) and 11(b) (2) consolidated. For earlier decision, see (1941) 40 PUR(NS) 306.*

APPEARANCES: Paul S. Davis, Ralph T. McElvenny, and Louis F. Davis, for the Public Utilities Division of the Commission; John C. Weadock, and Winthrop, Stimson, Putnam & Roberts, by George Roberts and Hayden N. Smith, for The Commonwealth & Southern Corporation.

By the COMMISSION: This proceeding was initiated by our order dated April 8, 1941, pursuant to § 11 (b) (2) of the Public Utility Holding Company Act of 1935, 15 USCA § 79k(b) (2).[1] The immediate issues raised by this order were whether or not the corporate structure of The Commonwealth & Southern Corporation, a registered holding company (hereinafter sometimes referred to as "Commonwealth"), unduly and unnecessarily complicates the structure of its holding company system; whether or not voting power is unfairly and inequitably distributed among security holders of such holding company system; and whether or not the corporate structure of Commonwealth is such as not to justify more than a single class of stock. The order also set this matter down for hearing, and provided that Commonwealth should be given opportunity at the hearing to show cause why an order should not be entered pursuant to § 11(b) (2) requiring Commonwealth "to reduce its corporate structure to a single class of stock, such stock to be common stock . . ."[2]

[1] Section 11(b) (2) makes it the duty of this Commission "as soon as practicable after January 1, 1938:

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. . . ."

[2] Notice of and order for hearing, Holding Company Act Release No. 2679; Federal Register (Vol. 6, No. 70, p. 1884) April 10, 1941. Neither the purpose nor the effect of the order to show cause in this proceeding was to cast the burden of proof on the respondent. Thus it is not to be regarded in the same light as a show-cause order in an ordinary law suit.

The issues at the present stage of this proceeding do not involve any question as to the mechanical processes by which simplification of Commonwealth's corporate structure may be effected, or as to the instrinsic values of Commonwealth's assets or of its outstanding classes of securities.[3] As we pointed out in a previous opinion issued in this matter, the substantive issues now before us under § 11 (b)(2) and the order issued thereunder resolve themselves into the following two questions:

(1) Does the present corporate structure of the respondent "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of [its] holding company system?"
and

(2) Would a reduction of the respondent's corporate structure to a single class of stock—i. e., common stock—be a step "necessary to ensure" that the respondent's corporate structure will not "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system?"

For the reasons stated below, we have concluded that both the foregoing questions should be resolved in the affirmative. It will therefore be necessary for us to consider additional related questions raised by Commonmonwealth, which may be briefly summarized as follows: whether or not the notice in this case has been sufficient; whether or not an order of the type contemplated in our order to show cause is authorized by the act and should be issued at this time; and whether or not the record herein provides sufficient evidentiary basis for such an order. For convenience of reference our opinion will be subdivided as follows:

1. Commonwealth's corporate structure and holding company system
2. Necessity for readjustment of corporate structure
3. Necessity for and propriety of order for common stock capitalization
4. Sufficiency of notice and evidence
5. Conclusion.

1. *Commonwealth's Corporate Structure and Holding Company System*

[1, 2] Commonwealth was organized under the laws of Delaware in May, 1929, with a view toward bringing together, under common control, a number of utility and nonutility companies operating in middlewestern and southeastern areas of the United States. To this end, in 1929 and 1930, Commonwealth issued shares of its own preferred and common stocks, and option warrants for the purchase of its common stock, in exchange for outstanding shares of preferred and common stock and warrants of the following holding companies: Commonwealth Power Corporation, Southeastern Power & Light Company, and Penn–Ohio Edison Company.

By the end of 1929 Commonwealth had acquired over 96 per cent of the common stock of each of these companies. Early in 1930, pursuant to a plan of merger and consolidation, Commonwealth acquired all of their

[3] Re The Commonwealth & Southern Corp. (1941) Holding Company Act Release No. 2831, 40 PUR(NS) 306.

assets and assumed all of their liabilities, and the companies were then dissolved.

During the same period Commonwealth also issued stock and warrants in exchange for outstanding shares of preferred and common stocks of Allied Power & Light Corporation (Delaware) and common stock of Columbus Electric & Power Company. Allied Power & Light Corporation was engaged, directly or through a subsidiary, in rendering supervisory, development, engineering, construction, and other services to public utility companies (including subsidiaries of Commonwealth Power Corporation), and also had large investments in utilities and holding companies (including Commonwealth Power and Penn–Ohio Edison). Columbus Electric & Power was an operating utility which, upon its acquisition, became a part of the Southeastern system.

Just prior to the 1930 merger the investments owned by Commonwealth Power, Penn-Ohio Edison, Southeastern, and Allied Power & Light were carried on their books at an aggregate of $340,896,261.[4] Upon completion of the merger these investments were carried on Commonwealth's books at a figure of $872,101,832—an increase of more than $531,000,000. The securities issued and assumed by Commonwealth in connection with these acquisitions and mergers, and for $45,000,000 cash acquired as hereinafter described, were as follows:

Securities	Par or Stated Value
Debentures of Southeastern (assumed)	$41,491,000
Debentures of Penn-Ohio Edison (assumed)	13,998,500
Preferred stock (1,354,931 shares issued in exchanges, stated at liquidating preference of $100 per share)	135,493,100
Common stock (33,250,969 shares issued for cash and in exchanges, stated at $5 per share)	166,254,845
Option warrants (to purchase 17,601,376 shares of common stock)	(A)
Total debentures and stock at par or stated values	$357,237,445

(A) Stated value, if any, not disclosed by the record herein.

Capital surplus was recorded by Commonwealth at a figure of $596,372,086 which, of course, reflected the above-mentioned increase of more than $531,000,000 in the investment account.

Prior to the acquisitions and mergers described above, Commonwealth had in 1929 issued and sold 2,250,000 shares of common stock, and option warrants for a like number of shares, for $45,000,000 in cash.[5] Of this

[4] In the present proceeding no effort was made to determine what inflationary items were recorded on the books of the acquired companies themselves. That a substantial basis for such an inquiry exists is indicated by the report of the Federal Trade Commission to the United States Senate wherein it is stated that on the books of Southeastern Power & Light Company alone, investments in subsidiaries were carried at an excess of $42,597,229 over the cost thereof. The report stated that no examination was made of the accounts and records of Allied Power & Light, Penn-Ohio Edison, or Commonwealth Power Corporation. Sen. Doc. No. 92 (70th Cong. 1st Sess.) Part 78, p. 99.

[5] The subscribers for these shares and warrants were as follows:

Name	Shares	Warrants	Purchase Price
The American Superpower Corp	500,000	500,000	$10,000,000
The United Corporation	500,000	500,000	10,000,000
Electric Bond & Share Co.	375,000	375,000	7,500,000
Allied Power & Light Corp.	250,000	250,000	5,000,000
Bonbright & Company, Inc.	250,000	250,000	5,000,000
The United Gas Improvement Co.	250,000	250,000	5,000,000
Tucker, Anthony & Co.	125,000	125,000	2,500,000

amount $5 per share, or $11,250,000 was allocated to common stock capital and the balance, $33,750,000 was allocated to capital surplus and is included in the above item of $596,372,086. These shares and warrants, together with 145,069 shares of preferred stock issued and sold in 1930, were the only securities claimed to have been issued by Commonwealth for cash.[6] The consideration which it received for the remaining shares and warrants, issued as described above, consisted of the securities acquired in exchange therefor; and the dollar amount attributed to such securities on Commonwealth's books was computed on the basis of the approximate market quotations pertaining to such securities at the time of acquisition. Thus, Commonwealth's investment account carried investments in subsidiaries at a figure which bore no relation to the amounts at which the underlying securities, or the underlying properties, were carried on the books of the acquired companies.

In its applications for listing its shares on the New York Stock Exchange, and in its reports to stockholders commencing with the first report dated June 23, 1930, Commonwealth disclosed the amount by which its investment account—investments in subsidiaries—exceeded the aggregate of the par or stated value of securities of subsidiaries plus surplus "at dates of control"; and in February, 1933, Commonwealth eliminated such excess by writing down its investments by approximately $563,000,000 and charging a like amount to its capital surplus, as of the end of 1932.

The companies which were acquired through the exchanges of securities and the mergers described above have in some instances been rearranged and some of their properties have been sold.[7] For the most part, however, the present holding company system of Commonwealth is based on the properties and businesses of the companies so acquired.

The companies of the Commonwealth system as of December 31, 1940, are set forth in Exhibit 1 annexed to this opinion.[8] [Exhibit 1 omitted.] Such system at that time consisted of thirty-four companies, of which ten were public utility companies, direct subsidiaries of Commonwealth. Of these, five are designated as the "Northern Group," operating electric systems in Michigan, central Illinois, southern Indiana, Ohio, and western Pennsylvania; the other five are designated as the "Southern Group" and operate electric systems in southeastern Mississippi, Alabama, Georgia, southern South Carolina, and the northwestern arm of Florida. Some of these operate gas utility systems as well as electric. Commonwealth also directly or indirectly controls a number of companies which are nonutilities under the Holding Company Act, including a number which furnish transportation and other pub-

[6] Commonwealth's predecessors had, immediately prior to their acquisition, received some $16,000,000 in cash for common stocks issued by them upon exercise of their outstanding option warrants. In addition, these predecessor companies had previously made direct sales of some of their stock for cash.

[7] Extensive properties formerly operated by subsidiaries of Commonwealth in and adjacent to Tennessee were sold to the Tennessee Valley Authority in 1939.

[8] This exhibit also shows the percentage of voting securities of each subsidiary held by its immediate parent.

lic services.[9] One of the system companies, The Commonwealth & Southern Corporation (New York), is a mutual service company the stock of which is owned by certain of Commonwealth's subsidiaries in amounts approximately in proportion to their gross operating revenues. The question as to which these companies may be retained by Commonwealth and which of them are not retainable under § 11(b)(1) of the act has been raised in a collateral proceeding under that section.[10]

Initially, as we have seen, Commonwealth assumed debentures of predecessor holding companies and issued preferred and common stocks and option warrants, principally in connection with the acquisitions described above, and partly for cash. It also, in 1929, declared and distributed two stock dividends of 1/80 share to the holders of its common stock. Thus, upon completion of the 1930 merger, it had outstanding the following:

Long-term debt (at 6% and 5½% interest)	$55,489,500
Preferred stock, cumulative $6 dividend series, 1,354,931 shares at liquidating value of $100 per share	135,493,100
Common stock, 34,011,010 shares stated at $5 per share	170,055,050
Option warrants, entitling holders to purchase 17,601,376 shares of common stock at $30 per share	(Stated amount, if any, not available.)

On the basis of earnings reported by Commonwealth's predecessor companies for the year 1928, consolidated net income indicated as applicable to Commonwealth's common stock was approximately 65.7 cents per share.[11] Of course, on a conservative basis, corporate net income applicable to such shares would be estimated at substantially less than consolidated net income, and it appears probable that the original subscription price of $20 for each unit consisting of one share and option warrant was based more on anticipation of increased earnings or on market quotations than on past performance. The subscription price of $30 per share provided in Commonwealth's option warrants would seem to have been highly speculative from the start.[12]

It is clear, on the basis of Commonwealth's own books, that its original capital structure was unsuited to its subsequent earning power. Exhibit 2 annexed to this opinion shows Commonwealth's reported consolidated and corporate net income and dividend record for the years 1930–1940, inclusive, and for the twelve months ended March 31, 1941. [Exhibit 2 omitted.] From this it will be seen that its corporate net income as reported for 1930, the year of the consolidation and merger, was the largest in its

[9] The type of business done by each company is indicated on Exhibit 1. [Omitted herein.]

[10] Re The Commonwealth & Southern Corp. (1940, 1941) Holding Company Act Releases Nos. 1956 and 2626, 38 PUR(NS) 39.

[11] This estimate is based upon the reported consolidated net income applicable for 1928 to the common stocks of Commonwealth Power, Penn-Ohio Edison, and Southeastern, against which 83.6 per cent of the common stock of Commonwealth was issued. Earnings reported for Southeastern were before Federal income taxes.

[12] Former Commissioner (now Mr. Justice) Douglas' characterization of warrants as "a hybrid form of securities which add only a speculative element" is particularly apt here. *Cf.* Re International Paper & Power Co. (1937) 2 SEC 580, 585. The possibility that any of Commonwealth's warrants will ever be exercised—for the purchase of common stock at $30 per share—is now so remote as to be imperceptible. Such common stock has never sold at a price higher than 29¼ on the exchanges on which it has been listed, and that price was reached only in 1929. The low

history but was equivalent to less than 62⅓ cents per share of common stock, after preferred dividends. This was despite the fact that Commonwealth at that time (and for several years thereafter) was recording as corporate net income an amount almost equal to its consolidated net income,[13] and (as will presently be demonstrated) was reporting a larger consolidated income than would be possible today by making relatively small provisions out of income for the retirement and depreciation reserves of its utility subsidiaries.

Since 1930 Commonwealth's consolidated and corporate net income have fluctuated widely. Reported corporate net income was more than sufficient to cover preferred dividend requirements in 1930, 1931, and 1932, and such dividends were paid. Nearly all the $21,000,000 reported excess applicable to the common stock for 1930 was paid out in dividends thereon at 60 cents per share. The excess over preferred dividends for the years 1931 and 1932 combined amounted to $15,728,597 but for those years a total of $16,948,233 (50 cents per share) was paid out in dividends on the common stock. Since 1932, the corporate net income reported by Commonwealth has in no year been sufficient to cover the annual preferred dividend requirements of approximately $9,000,000, and of course no further dividends have been declared or paid on the common stock.

Full payment of preferred dividends on the preferred stock was continued in 1933 and 1934 although the reported corporate (and also consolidated) net income was insufficient therefor. In each year since 1934 only one-half of the $6 preferred dividend has been paid. Inasmuch as these dividends are cumulative, arrearages therein have been accumulating at the rate of approximately $4,500,000 per year and amounted on October 31, 1941, to $31,117,758. As of that date, earned surplus on a consolidated basis is reported as $7,706,845.

That Commonwealth may have substantially overstated its true earnings during the earlier years of its corporate existence is indicated by the fact that its subsidiaries were making relatively small provisions out of gross revenues for their retirement and/or depreciation reserves, and thus were able to report larger income from operations than would be possible under practices prevailing in more recent years. The table set out below shows the combined annual provisions made by Commonwealth's subsidiaries for such reserves, from the beginning of 1930 to October 31, 1941, and the ratio of such provisions to the combined gross property accounts of such subsidiaries as those accounts were carried on their books at the end of each of the years shown:

price for that year was 10. Since then the price range for such stock has been:

Year	High	Low
1930	20¼	7½
1931	12	3
1932	5⅛	1⅝
1933	6⅛	1¼
1934	3¾	1
1935	3	¾
1936	5½	2½
1937	4⅛	1
1938	2¼	1
1939	2⅛	1⅛
1940	1⅜	⅝
1941*	1⅛	⅜

*To March 31, 1941.

[13] As shown by Exhibit 2 [omitted herein], a more conservative practice was adopted beginning in 1935.

Year	Combined Gross Property Accounts	Combined Annual Provisions for Depreciation and Retirements (A) Amounts	% of Gross Property
1930	$1,032,252,000	$9,548,370	.93
1931	1,050,964,000	9,547,161	.91
1932	1,044,303,000	9,538,719	.91
1933	1,040,036,000	9,536,809	.92
1934	1,040,085,000	9,867,479	.95
1935	1,032,552,000	10,378,805	1.01
1936	1,044,567,000	11,848,199	1.13
1937	1,067,481,000	15,774,989	1.48
1938	1,091,828,000	16,265,691	1.49
1939	1,001,396,000	16,508,010	1.65
1940	1,010,808,000	18,208,916	1.80
Twelve months ended Oct. 31, 1941	957,739,000	19,976,180	2.09

(A) Provisions for retirement reserves 1930 to 1936, inclusive; provisions for depreciation and retirement reserves for 1937 and years thereafter.

Commonwealth has submitted statements of officers of its system companies to the effect that, in their opinion, the present reserves of their respective companies are adequate and the provisions for retirement and depreciation reserves made in past years were not inadequate. Despite these opinions, it might well be inferred that if the provisions made in recent years are proper, at least those made prior to 1937—little more than half as large as current provisions—were not adequate. Some support for such an inference is also found in the fact, shown on Exhibit 3 appended to this opinion, that as of October 31, 1941, the system's reserve for depreciation and retirements was somewhat less than 11 per cent of the combined property account per books of subsidiaries. Moreover, of the present combined reserve of $103,782,896, more than $16,000,000 was not accumulated through regular charges to income but was added during the past twelve months in connection with recapitalizations and other capital adjustments of four subsidiaries.[14] Without purporting to decide whether or not adequate provisions for retirements and depreciation have been made in the past, however, we think it clear that such provisions were very substantially less than would be required by present-day standards, and it appears probable that greater, rather than less, provision therefor will be required in the future.[15] Consolidated net earnings for the future, therefore, must be estimated (when the time comes for making such an estimate) with those requirements in mind, and not on the basis of earnings shown on Exhibit 2 for Commonwealth's earlier years.

We do not purport to estimate at this time what the prospective earning power of the system companies may be, as that is a question that must be taken up later in evaluating Commonwealth's assets and outstanding classes of stock. We have at this time gone

[14] See: Re Georgia Power Co. (1941) 8 SEC 656, Holding Company Act Release No. 2586 (added $13,129,484 to depreciation reserve); Re Gulf Power Co. (1941) Holding Company Act Release No. 3018 (added $652,673 to depreciation reserve); Re Mississippi Power Co. (1941) 44 PUR(NS) —, Holding Company Act Release No. 3019 (added $349,733 to depreciaiton reserve); and Re Alabama Power Co. (1942) Holding Company Act Release No. 3283 (added $1,887,565 to depreciation reserve).

[15] Indeed, Commonwealth's recent statements of consolidated income contain notes to the effect that a future increase in subsidiaries' annual provisions for depreciation may be indicated.

into the question of depreciation and retirement provisions only in so far as they cast some light upon the earnings which Commonwealth has reported in the past and, hence upon the proven inadequacy of the earnings basis for Commonwealth's corporate structure in past years.

The most recently available consolidated balance sheet and earnings statement of the Commonwealth system, furnished by Commonwealth, are appended hereto in condensed form as Exhibits 3 and 4. Based on Exhibit 3, the system's outstanding securities bear the ratios shown below to the subsidiaries' combined net property accounts and other net assets of the system:

The Commonwealth & Southern Corporation and Subsidiaries Property Coverage of Outstanding Securities As of October 31, 1941[a]

Property Base		
Combined gross property accounts		$957,738,507
Less depreciation reserves		103,782,896[b]
Net property		$853,955,611
Add: Sinking fund, other deposits, and miscellaneous investments		11,634,539
Net current assets		31,553,821
Total property base[c]		$897,143,971
Securities	Amount	Per cent of Property Base
Long-term debt of subsidiaries held by public	$464,226,614	
Preferred stock of subsidiaries held by public (at liquidating preference)	213,919,600	
Instalment notes of Commonwealth	13,000,000	
Total of above	$691,146,214	77.04
Preferred stock of Commonwealth, including $31,117,758 of dividend arrears	181,117,758	20.19
Balance of property base applicable to common stock of Commonwealth	24,879,999	2.77
Total property base	$897,143,971	100.00

[a] Based on Exhibit 3, which includes adjustments made by Commonwealth to reflect the refinancing of Alabama Power Company and partial liquidation of Tennessee Utilities Corporation which occurred after October 31, 1941. [Exhibit 3 omitted herein.]

[b] Does not include $11,342,751 of special property reserves of Alabama Power Company (see Exhibit 3).

[c] Excludes (i) net excess at which investments in subsidiaries are carried over the underlying book value thereof, shown on Exhibit 3, and (ii) deferred charges. See text *infra*.

The "property base" shown on the foregoing table should be considered in the light of the following comments:

(a) "Combined gross property accounts" represents the total of the plant and property accounts of consolidated subsidiaries, which accounts do not purport to represent the present-day replacement or realizable values of fixed properties. They include intangibles which have not been segregated or analyzed for the purposes of this proceeding, and are stated principally at amounts recorded for properties acquired as entireties at various dates, whether or not in transactions negotiated at arm's length, on the basis of cash paid, par or stated value of securities issued, liabilities assumed, and retirement reserves and surpluses taken over, plus additions at cost, less retirements. Certain subsidiaries have filed with the Federal Power Commission and state utility Commissions their reports on the reclassification of their utility plants and determinations of original cost thereof, and certain others are still in process of reclassifying their property accounts, as re-

quired by the systems of accounts prescribed for such companies. The results of these original cost studies, when completed, may have a material effect on the financial statements of some of the companies.

(b) Excluded from the table is the $110,833,459 net excess at which investments in consolidated subsidiaries are carried on the books of owning companies, less reserve therefor, over the underlying book values thereof, shown on Exhibit 3. Such net excess arose mainly out of the circumstance that there have been recent reductions in the common capital and surplus accounts of certain subsidiaries, reflecting among other things the elimination of certain inflationary items in the property accounts of such subsidiaries and increases in their depreciation reserves (see cases cited *supra,* footnote 14). The eliminations affecting underlying property accounts were deducted by Commonwealth in arriving at the item "Plant and property" shown on Exhibit 3, but since no corresponding adjustment was made in Commonwealth's investment account, amounts equivalent to such eliminations are still reflected in such investments and appear in the consolidated balance sheet as part of the "net excess," as do the recent increases in subsidiaries' depreciation reserves. Obviously, such "net excess" is not a part of the property base for securities of Commonwealth's subsidiaries, and in our opinion it may not properly be included as a part of the underlying property base for outstanding senior securities of Commonwealth itself.[16]

(c) Also excluded from the property base are deferred charges totaling $21,567,362, representing debt discount and expense, premium paid on long-term debt redeemed, preferred stock premium discount and commission expense and other items in process of amortization. Although these items, according to current accounting practice, may be includable on the asset side of the balance sheet, they obviously do not represent property. Rather they represent charges against future earnings.

As shown by the foregoing table, the preferred and common stocks of Commonwealth itself represent an aggregate of but 22.96 per cent of the property base, and of this, the common stock represent but 2.77 per cent. Commonwealth's own debt, consisting of $13,000,000 principal amount of bank debt, represents 1.45 per cent of the property base, so that all of its outstanding securities together represent 24.41 per cent thereof.

Commonwealth owns virtually all of the common stocks of its subsidiaries, most of which are junior to substantial amounts of subsidiaries' funded debt and preferred stocks held by the public. Exhibit 5 appended hereto shows the amounts of funded debt and preferred stocks issued by subsidiaries, and the amounts thereof held by the public and by Commonwealth

[16] It will be recalled that as of December 31, 1932, Commonwealth brought its account—investments in subsidiaries—into line with the underlying par or stated value of subsidiaries' securities owned, plus surplus at dates of control, and reduced its own capital surplus account accordingly (*supra,* p. 6). We take no position as to whether it is incumbent upon Commonwealth to effect a similar adjustment at this time. Indeed, as Commonwealth does not now have sufficient surplus against which to charge an amount anywhere near the equivalent of the "net excess" figure, a reduction in the stated value of its common stock would be necessary in the event such an adjustment were undertaken.

respectively as of March 31, 1941, with supplementary notes bringing the figures therein up to date. Though Commonwealth has in the past owned substantial amounts of the senior securities of its subsidiaries, in recent years it has reduced such holdings by surrendering the same for cancellation and otherwise (see, for example, cases cited *supra,* footnote 14). At the present time its portfolio of such senior securities includes but $5,261,000 principal amount of bonds and $1,916,251 par or stated value of preferred stocks.

The recent surrenders for cancellation of such securities, while substantially strengthening the subsidiaries involved and, indirectly, Commonwealth itself, have resulted in Commonwealth's corporate income depending almost entirely upon the receipt of dividends on the common stocks of its subsidiaries [17]—dividends which, as indicated by the foregoing table, are subject to the prior fixed charges and fixed dividend requirements pertaining to the very substantial amounts of outstanding debt and preferred stocks of such subsidiaries.[18]

It will be observed that since the debentures originally assumed by Commonwealth required annual interest payments at 6 per cent and 5½ per cent, amounting to over $3,000,000 in the year ended March 31, 1941, and since Commonwealth's present bank debt substituted therefor calls for interest at only 2⅛ per cent on unpaid balances, considerable savings have been effected. The full amount of these savings will not, however, be immediately available to increase the earnings applicable to Commonwealth's outstanding preferred stock, as the premium paid by Commonwealth in 1940 and 1941 to redeem the debentures amounted to approximately $4,500,000, which amount is being amortized out of income over a 4-year period.[19]

According to Commonwealth's books, its corporate net income for the years 1938–1940 and for the twelve months ended March 31, 1941, has ranged from about $6,000,000 to about $7,500,000. In the last period mentioned it was $7,286,099 and, giving effect, to present fixed charges (without allowing for resulting increases in Federal and state income and profits taxes), Commonwealth's corporate net income would still have been insufficient in that period to satisfy its annual preferred dividend requirements of approximately $9,000,000.

With respect to voting power, the following facts are noted:

(1) Each share of Commonwealth's outstanding stock, whether preferred or common, entitles the holder to one vote.

(2) On the basis of the latest available consolidated balance sheet (annexed as Exhibit 3), the capitaliza-

[17] On the basis of its present portfolio, Commonwealth can count on receiving about $263,000 in interest and $126,300 in preferred dividends on the senior securities of subsidiaries. This compares with Commonwealth's own fixed interest and fixed dividend requirements currently exceeding $9,270,000.

[18] In the twelve months ended October 31, 1941, after adjusting for the subsequent refinancing of Alabama Power Company, the annual fixed interest requirements on publicly held long-term debt of subsidiaries exceeded $16,000,000 and the annual fixed dividend requirements on subsidiaries' preferred stocks held by the public approximated $11,700,000. See Exhibit 4. [Exhibit 4 omitted herein.]

[19] The amount so amortized during the twelve months ended October 31, 1941, was $1,144,525.

tion and surplus of the system, allowing for preferred dividend arrearages was as follows:

	Amount	Per cent
Securities of Subsidiaries Held by Public:		
Long term debt	$464,226,614	
Preferred stocks (par or stated value)	210,495,425	
	$674,722,039	66.55
Holding Company Securities and Dividend Arrearages:		
Bank loans	$13,000,000	1.28
Preferred stock	$150,000,000	
Dividend arrearages on preferred stock	31,117,758	
Preferred stock and arrearages	$181,117,758	17.86
Common stock	$168,366,640	
Less preferred stock dividend arrearages	31,117,758	
Common stock less arrearages	$137,248,882	
Consolidated Surplus:		
Capital surplus	127,782	
Earned surplus	7,706,845	
Common stock and surplus	$145,083,509	14.31
Total capitalization and surplus	$1,013,923,306	100.00

(3) Holders of Commonwealth's common stock as a class have 95.7 per cent of the voting power in the company and, indirectly, an overwhelming percentage of the total voting power in each company of the system,[20] while such stock represents but 2.77 per cent of the system's property base and but 14.31 per cent of consolidated capitalization and surplus, after preferred dividend arrearages, and has not been entitled to receive any dividends since 1932.

(4) Holders of Commonwealth's preferred stock as a class have but 4.3 per cent of the voting power in the company, which gives them no effective vote either in Commonwealth or in the system as a whole, although such stock, with unpaid accumulated dividends thereon amounting to more than $31,000,000 represents 20.19 per cent of the system's property base and 17.86 per cent of consolidated capitalization and surplus.

(5) Commonwealth's Common stock, representing but 2.77 per cent of the property base and but 14.31 per cent of consolidated capitalization and surplus, but controlling the entire system, is held by a large number of stockholders of which the four largest are The American Superpower Corporation, The United Corporation, Electric Bond & Share Company, and The United Gas Improvement Company. Together these companies own over 7,500,000 shares, or more than 22 per cent of the total common shares outstanding.[21]

2. *Necessity for Readjustment of Corporate Structure.*

We do not understand Commonwealth's position to be that its corporate structure does not need readjustment. Commonwealth does, however,

[20] See Exhibit 1 for the percentages of voting securities of subsidiaries held by Commonwealth.

[21] See Exhibit 1, note (a).

make the argument that "there is nothing in the facts now before the Commission to suggest or lay the basis for a holding that the existence of a preferred stock does 'complicate' the structure of respondent's holding company system"—and it takes the position that such structure "is indeed very simple." Commonwealth goes on to urge that from its financial statements, both corporate and consolidated, "it is apparent that the structure of respondent's holding company system is not complex or complicated, i. e., is not 'difficult to trace or understand, as a complicated problem in mathematics' (Merriam-Webster); is not 'not easily explained' (Funk & Wagnalls); is not 'perplexing' (Century); and is not 'complicated, involved, intricate or not easily analyzed or disentangled' (Murray's New English Dictionary)."

Commonwealth then argues that "to interpret the phrase 'unduly or unnecessarily complicate' to include any corporate structure having more than one class of security, unless the additional classes can be proved to be now necessary without regard to the conditions existing at the time of the creation of such classes and the interests which have become lawfully vested in such classes, is unduly to extend the meaning of § 11(b)(2)." [22]

These arguments, in our opinion, are based on a misapprehension of the primary issue, which is not whether the corporate structure of Commonwealth itself is unduly or unnecessarily complicated by reason of the number of its outstanding classes of securities. The issue is whether such corporate structure unduly or unnecessarily complicates the structure of its holding-company system as a whole, or unfairly or inequitably distributes voting power among security holders of such system.

We have gone at length into a discussion of Commonwealth's corporate structure as revealed by its own books and records, and find what cannot be denied: that against a property base amounting to approximately $897,144,000, senior securities held by the public, exclusive of Commonwealth's preferred stock, represent approximately $691,146,000, or 77 per cent of such base; that Commonwealth has outstanding $150,000,000 of preferred stock which, with dividends accumulated thereon, represents more than $181,000,000, or nearly all of the remaining 23 per cent of such base; that over a period of years Commonwealth's corporate net income has been insufficient to satisfy its preferred dividend requirements; that arrearages in such dividends are mounting at the rate of approximately $4,500,000 per year and now amount to more than $31,000,000; that dividends have not been paid on Commonwealth's common stock since 1932 and cannot be paid in view of the preferred dividend arrearages; that there are option warrants outstanding to which no privilege of substance is attached; that Commonwealth's assets consist almost entirely of common stocks junior to large amounts of outstanding debt and preferred stocks of subsidiaries; that its corporate income is almost entirely dependent upon the receipt of common dividends from such subsidiaries after satisfaction of their substantial fixed charges and preferred dividend

[22] Commonwealth's brief dated July 15, 1941, p. 13.

requirements; and that the entire system is effectively controlled by holders of Commonwealth's common stock which represents but 2.77 per cent of the system's property base and 14.31 per cent of consolidated capitalization and surplus.

It is thus too plain for argument that the present corporate structure of Commonwealth unduly and unnecessarily complicates the structure of the holding company system not merely because Commonwealth has three classes of securities outstanding, but because of the *inadequacy and inappropriateness of the underlying structure for the support and maintenance of Commonwealth's security structure.* It is also too plain for argument that Commonwealth's common stockholders, with an overwhelming percentage of voting power in the system, exert control through "disproportionately small investment" within the meaning of § 1(b)(3) of the act, 15 USCA § 79a(b)(3), and thus that Commonwealth's corporate structure unfairly and inequitably distributes voting power among security holders of the system.

That the underlying structure has been inadequate to support Commonwealth's corporate structure is amply demonstrated by the past history of the enterprise. As to the future, even if we were so optimistic as to believe there were a prospect that preferred dividend arrearages could be paid off out of earnings within a reasonably short period of time,[23] and payment of dividends on the common stock resumed, Commonwealth's corporate structure would still unduly complicate the structure of its holding company system, and unfairly distribute voting power among security holders thereof. As will be more fully developed in the next section of this opinion, it is not appropriate for a holding company to have outstanding debt and preferred stock bases on assets consisting almost entirely of common stocks which are themselves junior to large amounts of debt and preferred stocks, and thus to have fixed charges and fixed interest requirements dependent almost entirely upon the prospect of dividends from such common stocks.

In view of Commonwealth's large accumulation of preferred dividend arrearages, its inability to pay dividends on its common stock, the existence of its large issue of speculative option warrants, the inappropriateness of its outstanding securities to the character of its assets and revenues, and the existing distribution of voting power, the conclusion is inescapable that Commonwealth's corporate structure is repugnant to § 11(b)(2), and indeed, that it is patently in need of readjustment even apart from the special requirements of the Holding Company Act.

3. *Necessity for and Propriety of Order for Common Stock Capitalization.*

[3–6] The corporate structure of Commonwealth being repugnant to § 11(b)(2), the question arises as to what action we should require under

[23] Consolidated net income for the twelve months ended October 31, 1941, on a pro forma basis as shown in Exhibit 4, was approximately $13,520,000. On the basis of experience in recent years, as shown by Exhibit 2, this would indicate a corporate net income of approximately $7,300,000, or at any rate substantially less than the $9,000,000 required for full payment of Commonwealth's preferred dividends.

that section as a step *"necessary to ensure"* that the corporate structure of that company shall not "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of [its] holding company system." The specific issue raised by our order to show cause herein is whether the reduction of Commonwealth's capital structure to a single class of common stock is or is not a step necessary to ensure the attainment of the statutory objective.

Counsel for Commonwealth protested, at the oral argument, that he would not be able to advise his clients how to go about complying with an order making such a requirement. We are unable to take this protest seriously, especially in view of the fact that Commonwealth itself had just previously filed with us a voluntary plan which, if fully consummated, would result in the elimination of Commonwealth's preferred stock. Furthermore, our experience with other holding companies under similar circumstances has not indicated insurmountable difficulties on that score.[24]

The plan referred to above was filed by Commonwealth in answer to our order to show cause why recapitalization on a common stock basis should not be required, and also in answer to our tentative conclusions issued at Commonwealth's request in the proceeding under § 11(b)(1). It contemplates the disposition by Commonwealth of the common stocks of the northern group of utilities to holders of Commonwealth's preferred stock, subject to their consent individually, in exchange for their holdings of such stock. If the plan were fully consummated, Commonwealth would have no further interest in the utilities of the northern group and would have no preferred stock outstanding. Commonwealth asks that we examine this plan in connection with both the § 11(b)(1) proceeding and this proceeding, and either approve or reject it before deciding the issues raised herein by our order to show cause.

A plan of this kind is only a means to an end—a plan of action which may or may not be suitable as a step towards bringing the operations and corporate structure of the holding company system into compliance with the requirements of § 11(b). Whether one plan or another will afford suitable means of accomplishing the purpose fairly and equitably, with due regard for the interests of the various classes of outstanding securities, is of course an important and ultimately a controlling question to be determined; but it is not relevant to the problem presently before us, which is simply: What kind of corporate structure is necessary to ensure compliance with the statutory mandate? The answer to this broad question, in the form of the order which we conclude should be entered herein, will not preclude but is entirely consistent with full consideration of Commonwealth's plan at a later date to ascertain whether or not it is a suitable means of carrying out our order. Morevore, if we were to pass on the plan first, as suggested by Commonwealth, the issues raised in

[24] *Cf.* Re Community Power & Light Co. (1939) 6 SEC 182, 32 PUR(NS) 149; (1940) 33 F Supp 901, 35 PUR(NS) 135; Re Federal Water Service Corp. (1941) 8 SEC 893, 41 PUR(NS) 321, 361, Holding Company Act Releases Nos. 2635 and 3023.

the collateral proceeding under § 11 (b)(1) would have to be tried and decided before we could reach a determination and issue an order in this proceeding, because Commonwealth has conditioned its plan on our finding that its southern group of utilities constitutes a "single integrated public utility system" within the meaning of § 11(b)(1) or is otherwise retainable under the provisions of that section. It states that in the absence of such a finding, the plan will not be submitted to the stockholders for their approval.

Many difficult problems must be tried and resolved before a determination under § 11(b)(1) can be made. The result of taking up such problems before deciding the issues presently before us would be unwarranted delay in carrying out the legislative mandate that "as soon as practicable after January 1, 1938," we require compliance with § 11(b)(2) as well as § 11(b)(1). Our order herein will occasion no such delay in requiring compliance with § 11(b)(1) but, as will be more fully developed later on in this opinion, will facilitate such compliance. Thus we do not feel at liberty to countenance the immeasurable and unnecessary delay that would result from our acceptance of Commonwealth's suggestion.

Ample time will be afforded for compliance with our order after it is entered, as is contemplated by the act.[25] Other interested persons entitled to file plans of their own will be permitted to do so, and such plans will receive due consideration. Our order at this stage of the proceeding is to precipitate action, already long overdue, and to outline the ultimate objective to be accomplished by any plans filed. Thus our order at this time is not only necessary by virtue of the mandate in the statute but will be an appropriate guide to those persons in addition to Commonwealth who may be entitled to file plans herein to effectuate the purposes of § 11(b)(2).

As we pointed out above and in our previous opinion in this matter, any security other than common stock in the corporate structure of a holding company in some degree complicates the structure of its holding company system. This is not to say that such additional securities ipso facto are repugnant to the requirements of § 11 (b)(2). To come within the prohibitions of that section, they must *"unduly* or *unnecessarily* complicate" such structure. Thus the inquiry here must be whether the elimination from Commonwealth's corporate structure of all securities other than common stock is a step necessary to ensure that such corporate structure will not *unduly* or *unnecessarily* complicate the structure of its holding company system.

Elimination of Commonwealth's long term debt is, in our opinion, necessary for the ultimate accomplishment of this purpose. However, such debt is not in default, the terms under which it is issued require its liquidation in substantial semiannual instalments, and some acceleration of repayment has already been made.[26] There is no question as to Commonwealth's solvency. Under the circumstances,

[25] Sections 11(c) and 11(d).

[26] Commonwealth has recently accelerated payment of a portion of this debt with proceeds received from the sale of assets and liquidation of Tennessee Utilities Corporation. See Holding Company Act Release Nos. 3102 and 3133 (1941).

since we find that elimination of the funded debt is adequately provided for, we think it unnecessary to require any present readjustment thereof. Our order herein will require only that repayment of it be made according to its terms, subject to such repayment being accelerated from time to time if and to the extent that acceleration shall be found practicable and shall not be in contravention of the applicable provisions of the act and the Commission's rules, regulations, and orders thereunder.

Elimination of the preferred stock is, in our opinion, also necessary to ensure that the structure shall not unduly or unnecessarily complicate the structure of the system. Commonwealth urges that it is entitled to have some amount of preferred stock in its new capital structure, and has offered to prove that the intrinsic value of its assets and that its prospective earning power are sufficient to support a substantial amount of preferred stock. In our previous opinion we excluded the proffered evidence on valuation and assumed, for the purpose of argument only, that the intrinsic value of assets and the prospective earning power of Commonwealth were sufficient to justify a reasonably small amount of preferred stock on purely economic grounds and apart from the special standards of the Holding Company Act. On the basis of that assumption we there concluded that preferred stock in any amount would nevertheless be repugnant to § 11(b)(2) unless a reasonable necessity for its existence were shown, since otherwise it would be an "unnecessary" complication. It is unnecessary here to repeat at length the reasons leading to that conclusion.

Commonwealth has now sought to show that the "lawfully vested rights" of its "existing classes of stock make a preferred stock necessary." It submits that "the existing rights of preferred stockholders to have a preferred position and of common stockholders to have a leverage created by a preferred stock make a preferred stock a necessary complexity (if it be a complexity at all) just as much as does an inability to finance by any other type of securities."[27]

First, it should be observed that while the rights and priorities of the present preferred stock must be recognized and compensated in any plan of recapitalization, we understand the latest pronouncement of the Supreme Court—in the Consolidated Rock Case—to hold that such rights and priorities need not be *preserved* or *maintained* in the form in which they now exist. In that case, which arose under the Bankruptcy Act, the Supreme Court said:

"Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case. . . ."[28]

We need not go so far as to say here that in no conceivable case would the rights and priorities of the old security holders necessitate the issuance of a new preference security upon reorganization. That question must be examined if and when it is present-

[27] Brief of July 15, 1941, pp. 13-16.

[28] Consolidated Rock Products Co. v. Du Bois (1941) 312 US 510, 529, 85 L ed 982, 995, 61 S Ct 675. *Cf.* Re Community Power & Light Co. and Re Federal Water Service Corp. *supra* footnote 24; Re Northern New England Co. (1941) Holding Company Act Release No. 2737.

ed. But no circumstances are shown to exist here which establish any necessity for a preferred stock in Commonwealth's readjusted capital structure.

Second, the alleged right of the common stockholders "to have a leverage created by preferred stock" is not recognized by the act. Indeed, as will be pointed out below, the practice of issuing senior securities for leverage is one of the very practices that the act was designed to eliminate and prevent.

Third, the problem is not comparable with one where there is an "inability to finance by any other type of securities." The argument is founded on the premise that a preferred stock is in fact necessary. If the premise were sound, the conclusion would be the same as in any other case of necessity; but lacking a sound premise, the argument falls of its own weight.

Commonwealth also attempts to show that a preferred stock in the new capital structure would be permissible under the provisions of § 7 of the act, 15 USCA § 79g, and concludes that the requirements of § 11(b)(2) cannot be more stringent than those of § 7. We are not prepared at this time to agree that the tests laid down in § 11(b)(2) are no more stringent than those of § 7, for we have seen fit on occasion to grant requests made by issuing companies that temporary situations be permitted under § 7 subject to later action pursuant to § 11(b)(2). Conversely, however, it is well settled that securities cannot be issued by registered holding companies in recapitalization or reorganization proceedings under § 11 unless such securities meet the special tests set out in § 7.[39] While Commonwealth has attempted to demonstrate that a preferred stock might be permitted under § 7(c), its argument is incomplete in that it does not discuss the requirements of § 7(d), but only tends to show that a preferred stock would be permissible under § 7(c)(2)(A) as a security issued solely "for the purpose of refunding, exchanging, or discharging an outstanding security . . . or for the purpose of effecting a . . . reorganization," or under § 7(c)(2)(D) as a security issued solely "for necessary and urgent corporate purposes . . . where the requirements of [§ 7(c)(1)] would impose an unreasonable financial burden upon the [company] and are not necessary or appropriate in the public interest or for the protection of investors or consumers."

No preferred stock would be permissible under § 7(c)(1), but whether or not such stock were held to come within one of the exceptions provided in § 7(c)(2), it cannot in any event be approved by us if it fails to meet the more rigorous standards of § 7(d) which provides:

"(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

"(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding company system;

[39] *E. g.* Re The United Teleph. & Electric Co. (1938) 3 SEC 653, 656; Re Utilities Power & Light Corp. (1939) 5 SEC 483, 512; and see Re Community Power & Light Co. *supra*, 6 SEC at p. 194, 32 PUR(NS) at p. 159, n. 4; Re Peoples Light & P. Co. (1937) 2 SEC 829, 21 PUR(NS) 1.

"(2) the security is not reasonably adapted to the earning power of the declarant;

"(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

"(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

"(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

"(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

It will be observed that § 7(d)(1) requires consideration of whether or not a preferred stock would be "reasonably adapted" not only to Commonwealth's own security structure, but also to the security structures of the other companies in the system—i. e., the subsidiary companies; and § 7(d)(3) requires consideration of whether or not such a preferred stock would be "necessary or appropriate to the economical and efficient operation" of Commonwealth's business as a holding company or the business of the system in which it has an interest.

As we have shown above in § 1 of this opinion, the outstanding senior securities of the system exclusive of Commonwealth's preferred stock represent more than 77 per cent of the property base, leaving but 23 per cent of such base to be represented by stock of the holding company upon recapitalization. Such percentage would be somewhat less than conservative for common stock alone in an operating utility company, and the fact that we are here dealing with a public utility holding company does not warrant acceptance of more speculative standards.[30] Even a small amount of preferred stock in Commonwealth's new security structure would necessarily diminish still further the percentage of the property base applicable to the new common stock, and would increase the percentage represented by senior securities of the system to more than 77 per cent. We could not sanction such additional preferred stock for an operating company; a fortiori we could not sanction it for the holding company whose preferred stock would not rest upon operating properties but would be entirely based upon subsidiaries' common stocks which, in this case, are themselves junior to substantial issues of debt securities and preferred stocks. The issuance of a preferred stock by Commonwealth would, under these circumstances, constitute an evil akin to "pyramiding"—

[30] Our observation accords with that of A. M. Massie, vice president of the New York Trust Company, who has stated that "from a study of many [operating utility] companies, if, on the basis of present book values, the debt exceeds 50 per cent of the present book values, I would not consider it a very conservative capitalization. . . . Debt plus preferred stock should not exceed 75 per cent of present book value." 21 Savings Bank Journal (May, 1940), 34, 35. It should be noted that the securities of operating utilities are based directly on the income-producing physical properties, while the holding company's securities are one or more steps removed therefrom.

despite the fact that no intermediate holding companies are involved—and would be repugnant to the standards of §§ 7(d)(1) and 7(d)(3) as well as of § 11(b)(2).

The report of the Federal Trade Commission on utility corporations,[31] and the report of the National Power Policy Committee on public utility holding companies which was transmitted to Congress by the President and was annexed to the report of the Senate Committee on Interstate Commerce approving a bill which embodied § 7(d) in its present form,[32] each condemned the issuance of preferred stock in circumstances comparable with Commonwealth's. The recommendations of the National Power Policy Committee included the following:

"3. The issuance of new securities by holding companies should be adequately supervised by the Commission so that in reorganizations and rearrangements of properties an uninformed investing public shall not have foisted upon it securities which are in no sense secure and carry little or no voice in management. Security issues should be limited to purposes necessary in the public interest, which accords with the ultimate purposes of the legislation; and each security issued should bear a proper relation to the capital of the company, its existing securities, the securities of the companies in a geographically and economically related system, and, above all, to the prudent investment in the properties of the issuer and its underlying companies. *There should be an end to the pyramiding of holding company securities. Except for necessary discretionary power in the Commission in the case of refunding issues, new securities should be limited to par value common stock, with appropriate voting rights, and to first lien bonds,* i. e., bonds having a first lien either on physical assets of the issuer or upon first-mortgage bonds of operating subsidiaries. In this as in almost every phase of the holding company problem the ultimate interests of consumers and investors are identical. In a system burdened with overcapitalized and debt ridden holding companies, the consumers of operating subsidiaries have to support the top-heavy structure by paying high rates and by enduring poor service from inadequately maintained plants."[33]

The reasons for these recommendations are evident upon analysis. A relatively slight fluctuation in operating revenues from year to year will inevitably be transformed into a relatively wide fluctuation in earnings applicable to the holding company's common stock, where numerous items of deduction along the way are constants —as are deductions for fixed interest and preferred dividends. And not only does this render its common stock speculative; the same variations affect the earnings coverages of the senior securities tending to make them speculative also.

Such speculative elements are among the factors that "complicate" the structure of the system and render it "not easily analyzed or disentangled"—to use one of the definitions

[31] Sen. Doc. No. 92 (70th Cong. 1st Sess.) prepared in response to Sen. Res. No. 83 (70th Cong. 1st Sess.).

[32] Sen. Rep. No. 621 (74th Cong. 1st Sess.) on S. 2796.

[33] Id., at p. 59, italics supplied.

cited by Commonwealth. Furthermore, the existence of a stock purporting to have a fixed liquidating "value" and a fixed dividend may well be misleading, especially to the inexpert investor, when such stock is based on nothing but junior equity securities of subsidiaries and the expectation of dividends therefrom. As was testified before the House Committee on Interstate and Foreign Commerce:

Commissioner Healy. That is right. That is, you have the spectacle of people buying preferred stock in a holding company saying that they would not touch a common stock with a 10-foot pole, and when they look into the portfolio of the holding company and its assets, they see that they are common stocks, and they have bought common stocks without knowing it. And, the same thing is true of bonds. They rest upon those stocks.

Mr. Mapes. I notice in the report of the Federal Trade Commission that there is a recommendation that all preference securities of holding companies be done away with. Do you think that that would have any bearing on this situation?

Commissioner Healy. I think that would be very helpful. I do not think that they should be allowed to go on issuing so-called "preferred stocks and bonds" against common stocks in their portfolio.[34]

The issuance of so-called "preferred stocks" against junior equities in the portfolio has a tendency to operate not only to the detriment of the investors in holding company securities, but also to the detriment of consumers and security holders of the operating companies. As was said by the National Power Policy Committee:

"With a large and often unsound capitalization to support, many holding companies have not been able to be satisfied with reasonable dividends on the securities of their operating companies."[35]

The report of the Committee goes on to relate some of the abuses that pertained to service company charges as means of increasing the holding company's revenue at the expense of investors and consumers, which abuses have been outlawed by § 13 of the act. But other means to the same end were also recognized—among them being the use of control over the operating subsidiaries to cause them to declare excessive dividends on their common stocks and to conduct their operations and keep their accounts in such a way as to make this possible. These practices included (a) inflation of fixed property accounts, with a view toward exacting high rates from the consumer on the basis of high property "values"; and (b) insufficient expenditures for the maintenance of operating properties and insufficient provisions out of income for depreciation or retirements—to the detriment of the consumer because the practice tended to result in poor and uncertain service, and to the detriment of the investor in operating company securities owing to the failure to maintain properties in good condition and the failure to protect his investment by adequate reserves recognizing the diminution of

[34] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives (74th Cong. 1st Sess.) on H.R. 5423, p. 212. *Cf.* Report of the Federal Trade Commission (cited *supra* footnote 31), Part 72A, pp. 860–861.

[35] Op cit. *supra* footnote 32, at p. 56.

the service value of properties through normal use and obsolescence.[36] If properties are not adequately maintained and if sufficient provisions out of income are not made for depreciation reserves, the inevitable result will be excessive credits to earned surplus at the expense of capital accounts, and thus any dividends paid on the basis of the earned surplus account may in actual fact be distributions of capital in disguise.

With an originally inflated and overcapitalized superstructure the pressure upon the holding company's management to indulge in these practices is ever present in greater or less degree. But even if the security structure of the holding company does not appear inflated or overcapitalized at the time it is created, there is the risk that debt and preferred stocks—especially debt and preferred stocks based upon junior equities in the portfolio—will precipitate in a period of depression such a decline in earnings coverages as to inspire the same or similar types of abuse.

In view of the foregoing considerations, we find that a preferred stock in Commonwealth's security structure would not be "reasonably adapted" to the existing security structure of its subsidiaries, within the meaning of § 7(d)(1); and would not be "appropriate to the economical and efficient operation" of Commonwealth's business as a holding company or of the business of the system in which it has an interest, within the meaning of § 7(d)(3). We have already examined the question whether such preferred stock would be "necessary," and find that Commonwealth has failed to show any necessity therefor within the meaning of either § 7(d)(3) or § 11(b)(2). Indeed, we are of the opinion that the elimination of fixed dividend requirements and ultimately of fixed charges will be definite steps toward achieving the objectives of these sections, as it will not only decrease the speculative quality of the holding company's securities but will also tend to decrease any incentive on the part of the holding company to bring pressure upon subsidiaries to engage in bookkeeping and dividend practices inimical to their economical and efficient operation.

We do not wish to imply that Commonwealth is now engaging in the practices referred to above, and no finding is made to that effect. Our duty under § 11(b)(2) is to *ensure* that no undue or unnecessary complication will exist to provide an *incentive* to employ devices and practices of the type described. As was recently said by the circuit court of appeals for the sixth circuit, regarding our duties under the act:

"The phrase 'public interest' . . . is not to be construed as requiring the Commission to find that the conduct of the applicant's business has or will affect the public adversely. The statute contemplates action prospectively. It is a preventive measure intended to regulate action before the interests of those concerned are adversely affected."[37]

[36] These matters were of direct concern to Congress in enacting the Holding Company Act. See address of Representative Rayburn on the floor of the House, 79 Cong. Rec. 10322 (1935); Re Northeastern Water & Electric Corp. (1940) 8 SEC 64, 36 PUR(NS) 13, Holding Company Act Release No. 2314; Re Engineers Pub. Service Co. (1940) 8 SEC 366, 37 PUR(NS) 65, Holding Company Act Release No. 2535.

[37] Detroit Edison Co. v. Securities and Exchange Commission (1941) 119 F(2d) 730, 739,

Section 1(b) of the act declares that:

"The national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are *or may be* adversely affected—

"(1) . . . when such securities are issued . . . in anticipation of excessive revenues from subsidiary public utility companies . . .

"(3) when control of subsidiary public utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct state regulation of such companies, or when control of such companies is exerted through disproportionately small investment. . . ."

And § 1(c) provides that

". . . it is hereby declared to be the policy of this title, *in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils enumerated in this section . . . and for the purpose of effectuating such policy to compel the simplification of public utility holding company systems* and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public utility holding companies except as expressly provided in this title." (Italics supplied).

These provisions of § 1 bring up additional reasons for permitting no preferred stock—even an insubstantial amount in Commonwealth's new corporate structure. As we said in Re Community Power & Light Co.[38] quoted in our previous opinion herein:

"Speaking generally, one-stock plans are highly desirable not only in order to simplify a company's corporate structure but also to facilitate compliance with the requirements of paragraph (1) of § 11(b)."

The issues raised in the collateral proceeding (File No. 59-8) involving the application of § 11(b)(1) to Commonwealth and its subsidiaries have not yet been determined, but under that section these companies must limit the operations of the holding company system to "a single integrated public utility system" and to such incidental businesses and such "additional integrated public utility systems" as meet the statutory tests set out therein. Among those tests is one providing that no additional utility systems can be retained unless they are located in one state in which the principal utility system operates, or in one or more adjoining states or a contiguous foreign country.[39]

As we said in our previous opinion herein:

"Mere reference to a map of [Commonwealth's] system is enough to show that it does not meet that geographical requirement, for its public utility companies now operate in states extending from Michigan to Florida. [Commonwealth] will have to divest itself of the securities of a number of its subsidiary companies.

"It is of course possible that the divestiture of subsidiary company se-

39 PUR(NS) 193, 206, cert. denied October 13, 1941, 314 US 618, 86 L ed 67 62 S Ct 105.

38 (1939) 6 SEC 182, 194, 32 PUR(NS) 149, 159.

39 We have so interpreted clause (B) of § 11(b)(1); Re Engineers Pub. Service Co. (1941) 40 PUR(NS) 1, Holding Company Act Release No. 2897.

curities by [Commonwealth] pursuant to § 11(b)(1) might be accomplished by sales for cash which could be used to retire preferred stock, but it would be unfortunate for [Commonwealth] to be in the position of depending solely on sales for cash, and thus be at the mercy of the market, when that is unnecessary. Protection of [Commonwealth's] stockholders and the exigencies of § 11(b)(1) require that [Commonwealth] be in a position also to distribute securities of its subsidiaries in kind among its stockholders. The existence of preferred stock would seriously impede or possibly prevent such distribution, and would, therefore, obstruct compliance with § 11(b)(1). Clearly, the requirement of § 11(b)(2) that there be no *unnecessary* complication in the corporate structure must be interpreted and applied in the light of the mandate of § 11(b)(1)."[40]

In addition, our task under § 11(b)(2) is to find what steps are necessary "to ensure" that voting power will not be unfairly or inequitably distributed among security holders of the holding company system, and that control of the system companies will not (in the language of § 1(b)(3)) be "exerted through disproportionately small investment." Certainly the present effective control of Commonwealth's system through stock representing but 2.77 per cent of the system's property base and but 14.31 per cent of consolidated capitalization and surplus is a prime example of what the act sought to correct in proceedings under § 11(b)(2). The most effective step towards ensuring the elimination of this unfair distribution of voting power is to require Commonwealth to have only common stock outstanding, each share of which will have the same voting rights and the same stake in the enterprise. It is true that voting power can sometimes be fairly and equitably distributed among preference securities and common stock by giving to the holders of preference securities either a general voting power or a limited power to elect directors representing them as a class and, in the event of default in dividends, to control the management. But it is not certain that giving preferred stockholders the power to vote will actually result in a fair and equitable distribution of voting power or will actually eliminate control through disproportionately small investment. Preferred stockholders, limited to a fixed rate of dividends and a fixed liquidation preference, may well take only a limited interest in the management of the company's business. As long as their specific interests appear to be protected, they may be tempted to leave the management in the hands of the more vitally interested holders of common stock and thus, through inaction, permit control to be exerted solely by this smaller group of investors. Moreover, there are many practical difficulties in determining what precise allocation of voting power of different kinds would be fair and equitable as between different classes of security holders. The most efficient and effective way of ensuring attainment of the statutory objectives is to have a simple one-stock structure, with every share participating equally

[40] Re The Commonwealth & Southern Corp. (1941) 40 PUR(NS) 306, 311.

in the fate of the enterprise and in the control of its management.

In view of the foregoing considerations, we find that reduction of Commonwealth's corporate structure to a single class of stock, and that common stock, is a step necessary to ensure compliance with the requirements of § 11(b)(2). It remains to be seen whether an order to that effect should be issued at this time or whether, as suggested by Commonwealth, such order should be withheld in deference to the voluntary plan filed herein and the somewhat belated desire of Commonwealth to reorganize voluntarily.

Commonwealth cites several of our previous opinions[41] as authority for the proposition that an "in terrorem order" under § 11(b) should not be issued where the respondent is attempting to comply with that section voluntarily. We cannot take seriously the characterization of the order proposed here as "in terrorem," nor would our action in issuing it be in any way inconsistent with the cases cited. We adhere to our remarks in those cases, which are to the effect that compliance with § 11(b) may frequently be best accomplished by voluntary action. They do not hold, and indeed it would be clearly improper for us to decide, that the filing of a voluntary plan precludes us from taking appropriate action in line with our mandatory duties under § 11(b).[42]

Indeed, compulsion along broad and general lines, such as that inherent in our proposed order, is not inconsistent with but is designed to precipitate voluntary plans defining the methods and processes to be used in complying with the mandate of the statute. Our action here will at the same time point the direction in which such steps should be taken, in accordance with the statutory requirements as we see them. Such action is, we think, in line with the legislative mandate that "as soon as practicable after January 1, 1938" we require compliance with § 11(b), and it is in accord with the recommendations of the National Power Policy Committee expressed in its report to Congress (*supra*). The Committee recognized that the amount of reorganization to be required by the legislation which it proposed would take time, and said:

". . . it seems administratively advisable that every opportunity be offered the owners of holding company securities to work out their own processes of dismantling. That opportunity should, of course, be vigilantly guarded to protect the average investor. . . . On the other hand, if the . . . [attainment of the objectives of the legislation] is to be realistically expected at the end of a given period, there must be a constant pressure on the managers of holding company enterprises, persistent from the very beginning of that period, to insure a continual process of whittling down complicated capital structures and of disassociating operating properties not related to each other geographically or economically. . . .

[41] Re Federal Water Service Co. (separate opinion of Commissioner Healy) (1941) 8 SEC 893, 921, 41 PUR(NS) 321, 346, Holding Company Act Release No. 2635; Re American Water Works & Electric Co. (1937) 2 SEC 972, 987; Re Standard Gas & E. Co. (1940) 7 SEC 1089, 1091, 36 PUR(NS) 51; Re Community Power & Light Co. (1939) 6 SEC 182, 195, 32 PUR(NS) 149.

[42] *Cf.* Re The United Corp. (1941) 41 PUR (NS) 3, Holding Company Act Release No. 3109, petition for rehearing denied (1941) Holding Company Act Release No. 3127.

The devices recommended below are devices to effect that continual pressure to compel that continual dismantling process. . . . Voluntary action by the companies should be encouraged as much as possible, but the commission should be empowered to issue orders compelling necessary divestments, dissolutions, and reorganizations. Such orders should be enforceable in the courts. . . ."[43]

While the two houses of Congress disagreed at first on the precise objectives to be attained by the proposed legislation, and the present § 11 represents a compromise between their divergent views, there was never any disagreement about the recommended method of exerting pressure through an administrative commission for prompt compliance with the prescribed objectives.[44] Voluntary action by Commonwealth is long overdue. In our opinion § 11(b) not only empowers us, but makes it our duty, to enter an order at this time which will at least prescribe the broad outline of required action.[45] Our order will leave ample room for and will invite voluntary plans for compliance.

In this proceeding consideration will have to be given not only to the plan filed by Commonwealth but also to any other plans that may be filed herein by those entitled to do so. The fairness and feasibility of all such plans must be determined in the light of the same set of facts, and will involve questions under both §§ 11(b)(1) and 11(b)(2). Accordingly, our order herein will provide for the consolidation of further proceedings in this matter with the collateral proceeding (File No. 59-8) under § 11(b)(1), for the purpose of considering such plans and other matters as may come within the scope of the hearing. In this manner substantial savings in time, effort, and expense may be effected.[46]

If difficulties arise which render full compliance with our order impracticable during the ensuing year, we will at the appropriate time give consideration to any application that may be made by Commonwealth for the allowance of an additional year pursuant to § 11(c). Even then, it should be noted, to enforce the order we must apply to a court under § 11(d).[47]

4. *Sufficiency of Notice and Evidence.*

[7, 8] Commonwealth contends that inadequate notice of this proceeding has been given, and that the evidence now before us is insufficient as a basis for the order to be entered. In our opinion, neither of these points is well taken.

A. *Notice.* The argument on this point is that whereas notice was given to the respondent corporation, our order will affect the rights of the holders of its preferred and common stocks among themselves, and that such stockholders should be made parties to the proceeding and given notice as in a proceeding in personam.

Our notice of and order for hearing expressly gave notice "to all security holders of The Commonwealth &

[43] *Op. cit. supra* n. 32, at pp. 58, 60.

[44] H.R. 5423, S. 1725, S. 2796, S. Rep. No. 621, H.R. Rep. No. 1318, H.R. Rep. No. 1903—74th Cong. 1st Sess.

[45] *Cf.* Re The United Light & P. Co. (1941) Holding Company Act Release No. 2923. Questions raised by Commonwealth as to the constitutionality of the act are for a court, not for this Commission to decide. Re Engineers Pub. Service Co. *supra*, footnote 39

[46] *Cf.* Re The United Corp. *supra*, footnote 42.

[47] Re The United Light & P. Co. *supra*, footnote 45.

Southern Corporation" among others, and afforded them opportunity to be heard. In addition to being served upon Commonwealth, such notice was published in the Federal Register in accordance with the provisions of the Federal Register Act (49 Stat. 500, 44 USCA §§ 301–314) and was widely distributed by this Commission's public release system to the press and to persons on our mailing list.[48] Furthermore, widespread publicity regarding this proceeding has been given by Commonwealth itself in its annual report for the year 1940 sent to all stockholders of record.

In our opinion every reasonable measure has been taken to protect the rights of the stockholders and to notify them of this proceeding. We hold for the reasons stated in Re Northern New England Co.[49] that they need not be made parties or given notice individually.

[9] B. *Evidence.* The evidence upon which we have relied in this opinion consists exclusively of statements prepared and furnished by Commonwealth itself. Commonwealth has objected on several grounds to the use of this evidence, and for the purpose of discussing these objections it will be necessary to state here the nature of the documents involved and the manner in which they have been treated.

In response to our notice of and order for hearing dated March 6, 1940,[50] instituting the collateral proceeding (File No. 59-8) under § 11(b)(1) with respect to Commonwealth and its subsidiary companies, the respondents therein filed a document entitled a "motion to dismiss" and a brief in support thereof containing, among other things, a request that we either dismiss that proceeding or, in the alternative, hold it in abeyance and furnish to respondents a statement of our tentative conclusions as to the application of § 11(b) to the respondents' holding company system. We undertook to furnish such a statement,[51] and instructed the Public Utilities Division to prepare a report on the respondents' system in relation to the requirements of § 11(b). The division's report (referred to herein as the "Blue Book") was prepared accordingly, and was filed and made public on March 10, 1941. Based on facts alleged in the Blue Book, we formulated and issued our statement of tentative conclusions in the § 11(b)(1) proceeding,[52] and also issued the notice of and order for hearing instituting the present proceeding under § 11(b)(2).[53]

Thereafter, Commonwealth prepared a statement (referred to herein as the "White Book") in answer to the allegations contained in the Blue Book, and filed the White Book in both the collateral proceeding and this proceeding on May 1, 1941. In the course of the ensuing hearings, counsel for the Public Utilities Division sought to introduce both the Blue Book and the White Book in evidence in this proceeding. Upon the objection of Commonwealth, the trial examiner excluded the Blue Book except in so far

[48] See footnote 2 *supra.*

[49] (1941) 8 SEC 419, 37 PUR(NS) 11, Holding Company Act Releases Nos. 2464 and 2486. See also Re International Utilities Corp. (1941) 40 PUR(NS) 257, Holding Company Act Release No. 3047.

[50] Holding Company Act Release No. 1956.

[51] Re The Commonwealth & Southern Corp. (1940) 7 SEC 369.

[52] (1941) Holding Company Act Release No. 2626, 38 PUR(NS) 39.

[53] See footnote 2 *supra.*

as statements of fact contained therein coincided with statements of fact asserted or conceded by Commonwealth in the White Book; and he admitted the White Book in evidence subject to the condition, suggested by Commonwealth, that the Public Utilities Division specify the portions thereof on which it relied and indicate the relevancy and materiality thereof. It should be noted that Commonwealth objected to the admission of the White Book in evidence on the ground that the matter stated therein was irrelevant and immaterial to the issues in this proceeding, but not on the ground that such matter was inaccurate. Counsel for the Public Utilities Division duly made and filed its statement specifying the portions of the White Book relied upon to support the kind of order requested by it in this proceeding, and indicating the relevancy and materiality thereof.

Commonwealth's objections are: (a) that the issues in this proceeding involve the intrinsic values of its assets and outstanding preferred and common stocks, including the prospective earning power of Commonwealth and its subsidiaries; (b) that the White Book has been offered by the Public Utilities Division to be used as evidence of such values and earning power while the evidence offered by Commonwealth thereon—in the form of expert opinion testimony—has been excluded; and (c) that the ruling of the Supreme Court in United States v. Abilene & S. R. Co.[54] entitles Commonwealth to a more detailed specification than it has yet received as to the portions of the White Book relied upon and the relevancy and materiality thereof.

(a) We discussed the question of intrinsic values at some length in our previous opinion in this matter and there is nothing new in the argument in that connection. We there held, and repeat here, that at the present stage of this proceeding the present intrinsic values of Commonwealth's assets and outstanding stock, and its prospective earning power, are not at issue. At a later date, in passing upon the fairness of a plan or plans for the distribution of assets or the allocation of new common stock, determinations as to values and prospective earning power will be made on the basis of evidence then available. Further hearings will be held for the purpose of taking such evidence.

(b) The White Book has not, we think, been offered for use as evidence of the present intrinsic values of Commonwealth's assets or outstanding stock, or as evidence of prospective earning power; at any rate it has not been used by us as such. It contains consolidated and corporate balance sheets, earnings and surplus statements, schedules and notes to the same, and other historical data supplied by Commonwealth from its books and records relating to the companies of its holding company system. Despite the recognized fact that the book value of properties is "not likely to be understated in an industry where returns are regulated in relation to property value,"[55] and despite numerous indications in the record that the fixed property accounts of some subsidiaries will have to be revised downward, we

[54] (1923) 265 US 274, 68 L ed 1016, 44 S Ct 565.

[55] Report of the National Power Policy Committee, op. cit. *supra* footnote 32, at p. 56.

have not made any finding or drawn any conclusion from the data given which can be regarded as in any sense an estimate of the present worth of Commonwealth's assets or outstanding stocks,[56] or an estimate of its prospective earnings. We recognize that book figures do not purport to reflect present-day replacement or realizable values, and that historical earnings are not conclusive on the question of prospective earnings. Yet book figures have a significance of their own, and are relevant and material to the issues disposed of here. For example, company records (unless their accuracy is disputed) may be accepted as conclusive evidence of the security structures of the several companies in the system, the accounting and dividend policies of such companies, the nature of their property and investment accounts, liabilities, and other matters. Balance sheets and statements of income and surplus, subject to notes and comments, may (unless they are challenged) be taken as fair presentations in accordance with generally accepted accounting principles of the financial position of the companies at the dates of such balance sheets, and of the results of their operations for the periods covered by such statements of income and surplus.[57]

Data in the White Book were supplemented by further and more recent balance sheets and statements placed in evidence by Commonwealth. The same comments apply to such supplemental data.

We think we have made it clear throughout this opinion that the findings and conclusions on which we rely herein are based on book figures *as such* and do not purport to be determinations of present intrinsic values or of future earnings.

(c) The last objection mentioned is also without merit and, we venture to observe, is hyper-technical in character.

The White Book is a compact document of 212 printed pages. It was prepared by Commonwealth itself, and was filed by it in this proceeding—not in the general files of the Commission. It contains matter that is peculiarly within the knowledge of Commonwealth, and can occasion no surprise to it or its counsel. Further, counsel for the Public Utilities Division prepared and filed a specification as to the relevancy and materiality of the portions relied upon. Commonwealth objected that this specification was insufficient, but the trial examiner ruled that it complied with the condition imposed by him for the admission of the document in evidence.

The specification, in our opinion, was not only sufficient but entirely unnecessary under the circumstances. The statements contained in the White Book are a proper basis for findings

[56] The only possible exception is our conclusion that the outstanding option warrants are a purely speculative element in the corporate structure and must be eliminated. No claim to the contrary has been made, and we have been unable to conceive of any such claim that could be made in good faith.

[57] The use made here of book figures is not by any means novel. In nearly all cases where a question is presented as to whether or not a proposed security meets the tests of § 7(d) of the act, book figures (with or without adjustments to eliminate inflationary items from property accounts) have supplied the criteria for our determinations. Such cases are too numerous to require citation here.

The criteria are, of course, different when the issue involves the fairness of a plan for the allocation or distribution of securities. *Cf.* Re Utilities Power & Light Corp. (1939) 5 SEC 483, 498–503.

at least to the extent that they constituted admissions by Commonwealth in answer to allegations made by the Public Utilities Division.

After the close of the hearings, briefs were exchanged and filed herein, Commonwealth filing a reply brief. The brief of the Public Utilities Division set forth the facts on which it relied and the reasons why it regarded them pertinent. Moreover, on June 20, 1941, before the close of the hearings herein, we issued an opinion[58] stating what types of evidence we regarded as relevant and as irrelevant to the present issues, and specifically discussing the White Book.

The Abilene Case is not in point. There the Supreme Court held that the Interstate Commerce Commission could not rely, in a rate case, upon data contained in its general files—prepared and filed by respondent carriers and comprising voluminous annual reports —unless such reports were identified in the record of the case by specific reference. The court there was dealing with the question of whether and how far the Commission could go outside the record, into its general files and without specific notice to the respondents, to obtain data on which to base its findings. Here there was no excursion beyond the record and no failure of notice that the specific document would be used. The further question of hearsay evidence was involved in the Abilene Case since the findings affected each of the respondent carriers but might have been based on records filed by others, and the test of cross-examination was thus denied the respondents. Further, there was nothing in the record in that case to show what basic facts the Commission had relied upon. No such questions are presented here.

Nor is this a case where a great mass of material, both relevant and irrelevant, has been placed in the record so as to place an undue burden of analysis upon the respondent. We have heretofore condemned mass offers and mass conclusions which, without proper specification, cast upon the respondent "the burden of distributing the probative force of the evidence among the facts contended to be established, a task more properly borne by the proponent who is assumed to know by what evidence he claims to prove each fact he asserts to be in issue."[59] But the document involved here was but recently prepared by Commonwealth, is not extensive in content, and is clearly related to the corporate structure of Commonwealth and its subsidiaries. It relates to facts which were peculiarly within Commonwealth's own knowledge. If there had been no specification at all by the Public Utilities Division, the relevancy of the data to the issues in the case was sufficiently indicated by its brief and by our previous opinion herein.

5. *Conclusion*

We have shown that the present corporate structure of Commonwealth is repugnant to § 11(b)(2) and is in need of readjustment. We have also set forth, in this and in our previous opinion, the considerations leading to our conclusion that as a step necessary to ensure compliance with § 11(b)(2), Commonwealth's corporate struc-

[58] *Supra* footnote 3 (40 PUR(NS) 306).
[59] Re Electric Bond & Share Co. (1940) 7 SEC 881, 883, 35 PUR(NS) 225.

ture must be reduced to one class of stock—and that common stock—*provided,* that its present funded debt may be liquidated gradually according to its terms and without acceleration other than that which may be found practicable from time to time and which shall not be in contravention of the act or the Commission's rules, regulations, and orders thereunder. The legislative mandate makes it our duty to issue an order at this time requiring such step to be taken within one year, subject to Commonwealth's right to apply for an extension of time pursuant to § 11(c). Further proceedings will be necessary to determine the manner in which compliance may be effected.

As the manner of complying with such order will necessarily involve questions arising under § 11(b)(1), our order herein will provide that further proceedings in this matter shall be consolidated with the collateral proceeding (File No. 59-8) under § 11(b)(1); and as a plan has been filed by Commonwealth in both proceedings, an order will issue in due course reconvening the hearings, consolidated, for the consideration of such plan and any other plan or plans that may be proposed by duly qualified persons.

By the Commission (Chairman Purcell and Commissioners Healy and Pike), Commissioners Burke and O'Brien not participating.

ORDER

The Commission having instituted proceedings pursuant to § 11(b)(2) of the Public Utility Holding Company Act of 1935 by its notice of and order for hearing dated April 8, 1941, to determine whether or not the corporate structure of The Commonwealth & Southern Corporation, respondent, conforms with the requirements of § 11(b)(2), and if not, what steps are necessary to ensure that such corporate structure shall not, within the meaning of said section, unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of which respondent is a part; and the Commission having, in said order, directed that respondent show cause why its corporate structure should not be reduced to a single class of stock, which shall be common stock;

Notice having been duly given to all interested persons, and all such persons having been given an opportunity to be heard with respect to matters pertaining to the issue raised by said notice of and order for hearing as to whether The Commonwealth & Southern Corporation should be required to reduce its corporate structure to a single class of stock, such stock to be common stock; hearings having been held, briefs exchanged and filed, and argument thereon heard; and the Commission having this day issued and filed its findings and opinion herein; now therefore,

It is hereby *ordered,* pursuant to § 11(b)(2) of the Public Utility Holding Company Act of 1935 and in accordance with said findings and opinion, that The Commonwealth & Southern Corporation shall change its present capitalization to one class of stock, namely, common stock, in an appropriate manner, not in contravention of the applicable provisions of said act or the rules, regulations, and orders promulgated thereunder; *pro-*

vided, that its present funded debt may be liquidated according to its terms without acceleration other than such acceleration as may be found practicable from time to time and as shall not be in contravention of the applicable provisions of the act or the Commission's rules, regulations, and orders promulgated thereunder;

It is *further ordered,* in accordance with sub-paragraph (c) of § 11 of said act, that respondent shall comply with the preceding paragraph of this order within one year from the date hereof, without prejudice to its right to apply for additional time for compliance with such order as provided in such section.

And the respondent having filed a plan in this proceding and in a collateral proceeding (File No. 59-8) pending under § 11(b)(1) of said act concerning the respondent and its subsidiary companies, and having requested the Commission to consider and determine whether or not the provisions of said plan are in conformity with the requirements of §§ 11(b)(1) and 11(b)(2); and the Commission deeming that it would be appropriate in the public interest and for the protection of investors and consumers to consolidate this proceeding with the collateral proceeding (File No. 59-8) for the purpose of holding hearings on said plan and any other plan or plans that may be filed in either of said proceedings by any duly qualified person or persons;

It is *further ordered,* in accordance with the findings and opinion this day issued and filed herein, that this proceeding be and it hereby is consolidated with the proceeding (File No. 59-8) now pending under § 11(b)(1) of said act concerning respondent and its subsidiary companies, for the purpose of holding further hearings in said proceedings and taking evidence with respect to the plan filed therein by respondent, and any other plan or plans that may be filed in either of said proceedings by any duly qualified person or persons.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Raymond Williams et al.

v.

Bangor Gas Company

[Complaint Docket No. 13679.]

Commissions, § 28 — Jurisdiction — Nuisance — Gas lines.

The Commission has no jurisdiction over a complaint alleging that gas pipe lines are defective and that escaping gas causes injury to persons and damage to property, when it is not averred that the public generally is in any manner affected, since the injury stated is of a purely private nature.

[June 16, 1942]

WILLIAMS v. BANGOR GAS CO.

COMPLAINT *against gas company based on alleged leakage from pipe lines; dismissed.*

By the COMMISSION: The complainants in this proceeding constitute the members of a family living together in one house in the borough of Bangor, Northampton county, Pennsylvania, and are consumers of the respondent gas company.

They have instituted a complaint against the respondent alleging that its pipe lines adjacent to their residence have been defective for the past four years, and escaping gas therefrom has recurrently entered their home, causing injury to their persons and property. Specific claim is made that certain plants, ferns, and flowers of complainants were destroyed, complainants' coal bills were increased due to the fact that doors and windows had to be kept open in winter to free the house of gas, complainants were rendered ill and unfit for work from breathing the gas, and were deprived of the quiet enjoyment of their home. The original complaint asks the Commission to award general and special damages to the complainants in the sum of $7,832; direct the respondent to abate the alleged nuisance; to issue a restraining order to prevent "similar further aggravations and invasions of the plaintiff's right in their home and property."

An answer was duly filed by the respondent generally denying the allegations of the complaint and specifically challenging the power of the Commission to award monetary damages or order an abatement of the nuisance on the statement of facts as recited above. Subsequently, the claimants filed a reply withdrawing their claims for monetary damages from this proceeding, but renewing their request for the equitable relief sought in the original complaint.

While the disposition of this case no longer requires any discussion concerning our jurisdiction over damage claims, reference is here made to what was said by the Public Service Commission, predecessor to this Commission, on that subject in Knight v. Red Ball Transit Co. PUR1933E 367, 368:

"The functions of the Public Service Commission are generally to see that adequate service is rendered at resonable rates. Actions by public utilities to collect their charges or by patrons to recover damages, or other claims of a similar nature, have not been placed within our scope of authority. Whatever claims complainant may have against the respondents or any of them, either in contract or in tort, still remain within the jurisdiction of the local courts and are beyond our control. . . ."

Consequently, there remains for our consideration the question of whether or not the equitable relief sought by complainants is within the power of the Commission to grant.

A careful examination of the pleadings in the instant case indubitably characterizes the nuisance here involved as a private one, interfering solely with the private enjoyment of the complainants' home. It is our opinion that the instant case is analogous and consequently controlled by the

case of Stump v. Pennsylvania Power & Light Co. (1940) 35 PUR(NS) 59, wherein we held the abatement of private nuisances was within the jurisdiction of the courts and not in the Commission. In the Stump Case, *supra*, complainants alleged that respondent in the operation of its steam electric generating station located in Pine Grove township, Schuylkill county, caused large volumes and clouds of smoke, cinders, ashes, coal, and coal dirt to be deposited upon their land and buildings, thereby ruining and destroying a large portion of the crops and produce, making the same unsalable or salable at a price lower than the usual market price, impairing the fertility of the soil and hindering the proper cultivation thereof, impairing the health of complainants and their families and the well-being of their livestock. Respondent filed a petition to dismiss for want of jurisdiction on the grounds that it appeared from the fact of the complaint that the alleged cause of the complaint was of a purely private nature arising between complainants and the respondent by reason of the use and occupancy of respondent's property, and did not relate to the facilities or service of respondent as they affect the safety, adequacy, and sufficiency of such facilities for the carrying on of its business as a public utility, nor as they affect the accommodation, convenience, or safety of its patrons, employees, and the public.

After a series of hearings the Commission granted the prayer of the petition and dismissed the complaint for want of jurisdiction. The Commission held that the injury to complainants was purely private in nature and that it had no power to afford redress for such injury. In the course of its order (Stump v. Pennsylvania Power & Light Co. *supra*) the Commission stated as follows:

"A public utility corporation is to be considered in two aspects. It has duties which it owes to the public and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. It is with respect to the duties it owes to the public, that is, the furnishing of safe and adequate service at just and reasonable rates, that the Public Utility Law is primarily concerned, and it is with respect to the performance of those duties that the Commission is vested with supervisory and regulatory powers.

"It is not alleged in the complaint, nor is there testimony of record that the electric service rendered by respondent is inadequate or unsafe to its employees, patrons, or the public. The sole basis of the complaint is that respondent maintains and operates a part of its facilities used in generating electric energy in such a manner as to affect detrimentally the health and property of persons located adjacent thereto. It is under the clause—'necessary or proper for the safety, accommodation, and convenience of the public' as used in §§ 401 and 413, *supra*, that complainants predicate the authority of the Commission to take jurisdiction. That clause cannot be so construed. Taken with its context, it means that the suitable facilities, safety appliances, or other devices used by a public utility to perform its public duties, shall be safe for the security

and convenience of its employees as well as for the safety and convenience of its patrons and the public. It must operate its business with reasonably safe facilities and appliances. Its duty in that regard is to the public who use or desire to use its service and facilities, or the service and facilities of some other public utility, and who may be affected by the operation of the public utility: West Penn R. Co. v. Public Utility Commission (1939) 135 Pa Super Ct 89, 29 PUR(NS) 22, 4 A(2d) 545.

"The complainants are asking the Commission to take jurisdiction over matters which relate to a duty not of a public character. The appellate courts of several states and the Commissions generally throughout the states, including the former Public Service Commission, under statutes similar to the Public Utility Law, have consistently refused to exercise jurisdiction over such matters."

In the instant case the injury stated by complainants is of a purely private nature. The leak or leaks complained of are alleged to allow gas to escape into the house and premises of complainants, and it is not averred that the public generally is in any manner affected thereby. Complainants themselves in the complaint characterize the injuries as "continued trespasses which amount to a nuisance."

After having carefully considered all of the matters here involved, we find that the Commission has no jurisdiction over them, and that the complaint should be dismissed.

MARYLAND PUBLIC SERVICE COMMISSION

Public Service Commission of Maryland

v.

Louis Goldsmith

[Case No. 4553, Order No. 38626.]

Certificates of convenience and necessity, § 147 — Suspension of taxicab permit — Overcharges.

A permit authorizing taxicab operation should be suspended temporarily upon a showing that the driver of the cab has charged rates in excess of the authorized meter rates.

[July 23, 1942.]

COMPLAINT *against overcharge by taxicab operator; permit suspended.*

By the COMMISSION: Soldiers stationed at Holabird QM Motor Base having complained that drivers of taxicabs have charged rates in excess of the authorized meter rates for transportation from Pennsylvania

Railroad Station in Baltimore to the Motor Base, and said complaints having been forwarded to this Commission by the base chaplain, the Commission advised the chaplain to instruct the soldiers that, if there were further cause for complaint, they should make note of the cab number and license tag number and report them to the Commission.

The chaplain, under date of July 6, 1942, submitted to the Commission the complaint of Private Friedman and three others that, when they engaged Diamond Cab No. 206, bearing State License No. H 15–360, to take them from Pennsylvania Station to Holabird Motor Base at 11:45 P. M., July 5th, the driver demanded that they pay 50 cents each, and said the meter rates did not apply. The soldiers then released the cab but made note of the cab number and license tag number.

Upon receipt of this complaint, the Commission entered an order requiring Louis Goldsmith, owner of the cab cited by complainants, to show cause why his permit should not be revoked, and set the matter for public hearing. The hearing was had and two of the complainants, Private Jack Friedman and Private Leonard Schpolsky, appeared and testified. They couldn't identify the driver and couldn't give a description of the cab but said there could be no doubt as to the cab number and license number. The driver who had been given custody of the cab for the night shift of July 5th was present at the hearing and denied any knowledge of the incident.

The Commission has considered carefully the evidence submitted and has compared the cab and license numbers reported by complainants with those pertaining to other cabs, for the purpose of disclosing any possible confusion of numbers, and finds that Diamond Cab No. 206, bearing license tag No. 15–360, for which Louis Goldsmith holds taxicab permit No. 42X–2513, is the taxicab involved in this complaint. The Commission also finds that Louis Goldsmith has failed to exercise reasonable supervision of the taxicab operation for which he holds a permit and that his permit should be suspended for a period of fifteen days.

An order will be entered in accordance with these findings.

COLORADO PUBLIC UTILITIES COMMISSION

Colorado Motor Carriers' Association et al.

v.

Charles W. Wilson

[Case No. 4868, Decision No. 18810.]

Certificates of convenience and necessity, § 136 — Amendment of certificate — Limitation of area served.

The Commission may restrict private motor carrier permits to the actual

operations conducted where the carrier has failed to serve some of the area specified in the permit.

[May 9, 1942.]

APPLICATION *to restrict authority contained in private carrier permit; restrictions imposed.*

APPEARANCES: T. A. Stockton, Jr., Denver, for petitioners; A. J. Fregeau, Denver, for Weicker Transfer and Storage Company; Marion F. Jones, Denver, Colorado, for respondent.

By the COMMISSION: Respondent, Charles W. Wilson, is the owner of Permit No. A–626, which was originally issued on March 3, 1934, to E. C. Edwards and authorizes the transportation of freight between the Colorado-Wyoming state line and Denver, and intermediate points, with the restriction that no operation may be conducted over routes covered by Certificate No. 635. Said Certificate No. 635 authorizes the transportation of:

"Livestock between points in Laramie county lying north of the south boundary line of Ft. Collins as extended, and all other points within Colorado; transportation to the farms only within said territory of farm machinery and stock feeds and farm supplies from all other points in the state."

On August 29, 1941, Decision No. 17584, the Commission held that said Permit A–626 did not authorize transportation service between points within any municipal area of a town or city in local service, or the transportation of commodities in any cross-country service between routes existing between Denver and the Colorado-Wyoming state line.

The instant case is based upon a petition filed by the above-named petitioners, wherein they seek to restrict the authority contained in said Permit A–626 to the towns and cities on U. S. Highway No. 87 between Denver and La Porte, Colorado, upon the theory that all other territory in that part of Colorado north of Denver to the Colorado-Wyoming state line, has been abandoned by the respondent.

At the hearing, petitioners offered the road reports under A–626 and requested that they be made part of the instant record. However, by stipulation, it was agreed that the Commission would take judicial notice of said reports, and this was the only evidence introduced on the part of petitioners.

These reports disclosed that a great majority of all transportation service under this permit has been over U. S. Highway No. 87, extending as far north as Wellington and serving most of the points intermediate between Wellington and Denver. However, some service is disclosed to Johnstown, and after respondent commenced to make reports, one or two trips are shown to Walden and to Kelin, which is located between Loveland and Greeley.

Testifying in his own behalf, respondent stated that the original owner of said permit had pretty well covered the northern part of Colorado in his operations, but that the Anderson Transportation Company had confined most of their operations to Highway

No. 87 and only served customers who would have more than one movement of freight. He further stated that his own operations were more or less localized on U. S. Highway 87, but that he has picked up and delivered at points off of said highway; that he formerly reported all movements from the nearest town, which is why his reports failed to disclose these off-route points; that commencing in July, 1941, he started reporting from the actual point of destination. An examination of said reports discloses that this statement is correct. He introduced an exhibit showing some 36 hauls that had been made by himself and his predecessors under this permit from January 1938, to June, 1941, from points off Highway 87. The exact distances from Highway 87 are not given except in a few instances but show as northeast of Berthoud, east of Loveland as far as Johnstown, etc. Respondent further testified that from a point 5 miles west of Loveland on the west, to Johnstown on the east, would cover all of this transportation service, outside of the two or three trips made to Walden. Respondent contends that he never voluntarily abandoned any of his rights under said permit. Johnstown is approximately 10 miles east of Highway No. 87.

As we have pointed out in several other cases, mere failure to serve certain territory, does not of itself constitute abandonment. However, when this failure to serve has extended over a long period of time, with every indication that the operator has no intention of serving certain territory, we believe the Commission is justified in restricting private permits to the actual operations conducted, as otherwise when a new service is instituted by the owner thereof, it constitutes new competition with presently established common carrier service of which they had no knowledge, and tends to disrupt the established transportation system of the state. If, in the instant case, we authorize respondent to serve those points which his own testimony shows that his operations had been confined to, we believe that no injustice is being done to respondent, and at the same time we are protecting other common carrier service from what we believe would be unauthorized competition. In our opinion, the trips to Walden, the last one being in December, 1939, have not been sufficient to justify our granting authority to serve said area.

In rendering service under this permit, respondent must, of course, always be guided by the original authority contained in the permit and the restrictions therein imposed, as well as our clarification order of September 29, 1941, Decision No. 17584.

After a careful consideration of the record, the Commission is of the opinion, and so finds, that operations under Permit No. A–626 shall be further restricted to the extent hereinafter set forth.

Industrial Progress

Selected information about products, supplies and services offered by manufacturers. Also announcements of new literature and changes in personnel.

Equipment Notes

Jiggers Soldering Kit

A new product, Jiggers, for soldering electric wire splices is described by the manufacturer, Jiggers, Inc., 215 W. Illinois St., Chicago, Ill., as "a complete soldering kit in a nutshell."

Self Contained Soldering Unit

A Jigger is a small, soldering unit that contains the correct amount of solder and flux hermetically sealed within a waterproof heat-generating outer shell. By pushing the wire splice into the shell and touching a lighted match to it the shell ignites and produces the proper temperature to flow the solder into the splice.

Cotter Key Remover

The Tips Universal Snap-Out cotter key remover, marketed by A. B. Chance Co., Centralia, Mo., permits the hammering of cotter keys without losing contact with the key, according to the distributor. The tool reaches into difficult places, and the small point permits rolling engagement with buried cotter key eyes. This key remover is said to be especially effective on self-locking cotter keys. The fittings may be adjusted so that the tool will reach the key to be removed.

Extracts Stubborn Cotter Keys

Secondary Protector for Transformers

A new Thyrite secondary protector for use on current transformers to provide protection against high open-secondary-circuit voltages is announced by the General Electric Company. It consists of a disk of Thyrite connected across the transformer secondary terminals, together with a thermostatically operated short-circuiting switch.

In operation, when the external secondary circuit becomes accidentally opened, the secondary current will pass through the Thyrite disk. When the temperature of the disk reaches approximately 100 C., the thermostat operates the switch to short-circuit the Thyrite and prevent damage to the Thyrite that would be caused by overheating. When the temperature of the disk drops to approximately 80 C., the switch opens. This operation is repeated until normal conditions are restored to the secondary circuit, at which time the switch will remain open.

Thyrite Secondary Protector

Gar Wood Wire Reclaiming Winch

Gar Wood Industries, Inc., Detroit, offers a wire reclaiming winch which is a fast and economical unit for reclaiming telephone line wire.

With the Gar Wood winch, ten wires (each a mile long) can be coiled at the same time

Gar Wood winch saves wire removal and maintenance cost

at a speed of 150 feet per minute and the reclaimed coils of wire are nearly as perfect as original factory coils of new wire.

The winch is a power driven worm geared unit with automatic brake which prevents backward snap action.

The winch is entirely controlled from rear of truck and requires only one operator and a helper to assist in stripping the reels.

A 5-wire detachable unit is available for reclaiming small quantities of wire. This unit fits the standard winch.

Catalogs and Bulletins

Portable Watthour-meter Standard

A new portable watthour-meter standard which has high- and low-current capacity, combined with light weight is described in publication No. GEA 3614, issued by the General Electric Co. This 8-page bulletin is well illustrated showing construction detail. Curves typical of the performance of the new unit, IB-10 (60 cycles), show the ratio of readings of the standard to true watthours.

Elastic Stop Nut Chart

A wall chart, explaining the uses of its various types of self-locking nuts, is being distributed by Elastic Stop Nut Corporation, Union, N. J., to engineering departments, drafting rooms and maintenance shops.

Copies can be obtained by writing to the manufacturer.

Fluorescent Accessories Catalog

A new 16-page catalog on G-E fluorescent accessories is announced by General Electric's appliance & merchandise department, Bridgeport, Conn. Included with the catalog is a 2-page insert on the new G-E manual reset Master No Blink Starter.

Cutting Screw Threads

"How to Cut Screw Threads in the Lathe", a 21-page booklet covering the cutting of screw threads on back-geared screw-cutting lathes has been reprinted by the South Bend Lathe Works.

Complete information is given on the various types of lathe tools employed in cutting screw threads, how to grind them, and how they should be mounted and positioned.

This booklet (Bulletin No. 36-A) is priced at 10c a copy, postpaid, and can be obtained from the South Bend Lathe Works, Dept. 6Y, South Bend, Indiana.

Metal-enclosed Switchgear

A 12-page bulletin (GEA 3850) issued by the General Electric Co., describes metal-enclosed switchgear for heavy-duty direct-current service up to 250 volts, 8,000 amperes.

Manufacturers' Notes

Sylvania Electric Products, Inc.

Hygrade Sylvania Corporation, manufacturer of incandescent lamps, radio tubes and

Manufacturers' Notes (Cont'd)

one of the three largest producers in the fluorescent lighting field, recently became Sylvania Electric Products, Inc.

Walter E. Poor, executive vice-president of the company, described the step taken as "going deeper than a mere change in corporate name." While the policies and products remain the same, he said, various current trade relationships are effected, and the "modernized" name will help prepare the company for an even larger role in the post-war electronics and lighting industries.

Marmon-Herrington Promotions

Under a new organization setup, Bert Dingley, former executive vice president of the Marmon-Herrington Co., Indianapolis, Ind., becomes president, succeeding A. W. Herrington, who is now Chairman of Board of Directors. The following vice presidents have been elected by the Board of Directors: R. C. Wallace, in charge of engineering; Seth Klein in charge of production; C. Alfred Campbell in charge of public relations, and George E. Reynolds, in charge of the Eastern district.

William B. Nottingham was elected secretary, and H. DeBaun, treasurer succeeding D. I. Glossbrenner, who has resigned the dual offices of Secretary-Treasurer to enter military service. John J. Klein, assistant to Mr. Herrington, was elected assistant secretary, and L. M. O'Connor, assistant treasurer.

Glass Company Makes Turbine Spindles

Steel turbine spindle shafts for naval vessels are now in production at a plant of the Pittsburgh Plate Glass Company under subcontract from the Steam Division of the Westinghouse Electric and Manufacturing Company, according to L. E. Osborne, Westinghouse vice president.

In the Westinghouse effort to speed production of this vital war equipment, more than $15,000,000 worth of subcontracts have been placed by the Steam Division, where turbines and gears for naval and merchant vessels are built.

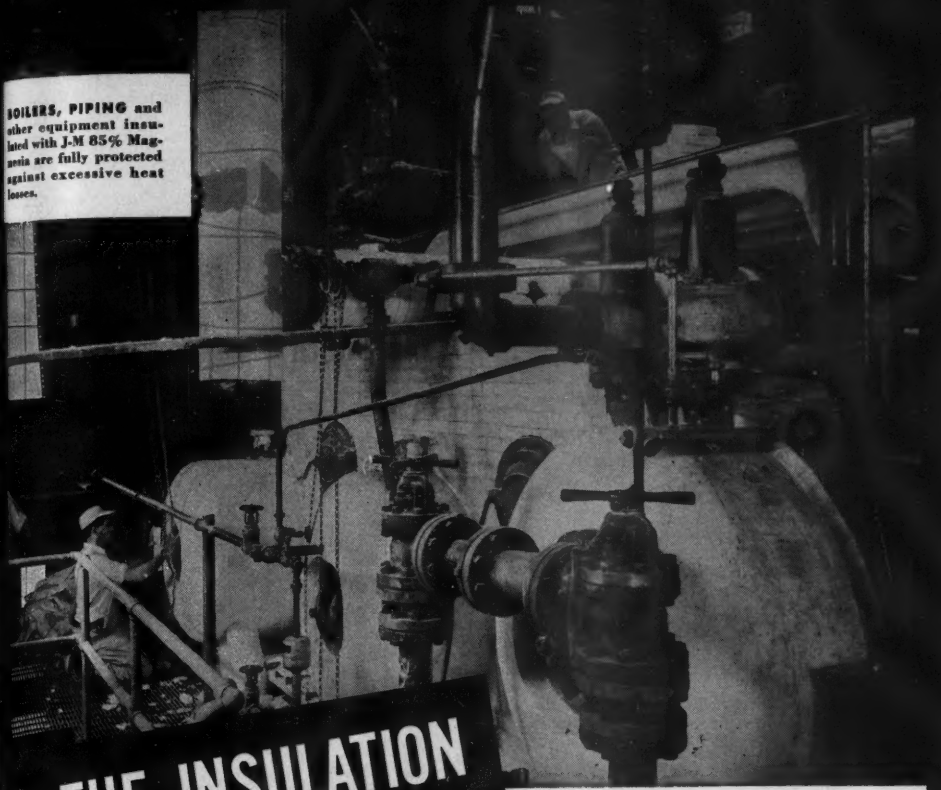
M. B. Elliott Appointed by G.E.

The appointment of M. B. Elliot to Manager of Sales, Unit Equipment Section, has been announced by General Electric's Central Station Department.

Under Mr. Elliot's jurisdiction in his new position are sales of unit substations and other similar factory-assembled equipments in particular demand today because of the speed with which they can be installed.

National Safety Meeting in Chicago

The 31st National Safety Congress and Exposition will be held in Chicago, October 26-29. Convention headquarters will be in the Sherman Hotel. The La Salle and the Morrison hotels also will be used by the meeting.



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J-M No. 500 Cement . . . Sil-O-Cel C-3 Concrete . . . Marinite

"E" Award for Todd Combustion

The Army and Navy "E" pennant recentl was awarded to the Todd Combustion Equip ment, Inc., New York. In ceremonies atop th roof of the company's building, attended by th 150 employees and the officers of the com pany. The company makes fuel oil burner which are used aboard Navy and merchant ves sels and in many of the nation's large industri plants engaged in war industry. The pennan was presented to President James McDonal by Captain Frank Loftin, U. S. N.

The pins which the employees are entitle to wear and which show that their factory ha received the pennant were presented to th officers of the organization and the workme by Brig. Gen. Ralph K. Robertson, in charg of security for the Second Corps Area. O behalf of the workmen they were received b James Drummond, a machinist, who with M McDonald raised the pennant at the conclu sion of the presentation ceremony.

Fibre Conduit Appoints Connell

Appointment of James R. Connell as vi president in charge of sales of The Fibr Conduit Company, Orangeburg, New Yor was announced recently by H. J. Robertso Jr., president.

Mr. Connell has been a member of the Boa of Directors of the Company since 1939, an will continue to serve in this post. He resigne as a partner in charge of the New York offi of Kebbon McCormick & Co., to join Th Fibre Conduit Company, with offices at 2 Madison Avenue.

Trains 8,000 Retail Men on Service

So that users of some 30,000,000 Westin house appliances can continue to enjoy th best possible service from their equipmen the Company's Merchandising Division ha just completed a national series of 300 servi training meetings in which 8,000 represent tives of dealers handling Westinghouse app ances were given a full day's schooling in t phases of service.

Cochrane Appoints Representative

Cochrane Corporation, Philadelphia, P announces the appointment of the Energy Co trol Company as flow meter representative f eastern Pennsylvania, southern New Jers Delaware and Maryland. Energy Contr Company is located at 3107 No. Broad Stre Philadelphia, and will also handle Hays co bustion control and instruments and the Ho con damper, according to the announcement.

Fuel Conservation Campaign

More power and energy for war producti are the objectives of a nationwide campaign fuel conservation, sponsored by the Americ Society of Heating and Ventilating Engineer

A forum on fuel conservation, sponsored the War Service Committee of the Society a

Manufacturers' Notes (Cont'd)

held at the Pennsylvania Hotel in New York recently inaugurated "War on Fuel Waste" week which was the opening gun in the campaign.

American Standards for Tool Wiring and Electricians' Gloves

The American Standards Association recently announced completion of another American War Standard—Machine Tool Electrical Standards.

Proposals for this work were brought to the ASA by the National Machine Tool Builders' Association. Purpose is to further speed the manufacture of machine tools by standardizing the electrical wiring of such tools. The standard has already been made mandatory by War Production Board Order L-147, which limits the future electrification of machine tools to the types of equipment recommended in the American War Standard. According to the WPB, "the standard has been found to provide satisfactory electrification for most purposes, and only under special conditions will machine tool builders be authorized to produce tools which do not comply with these specifications."

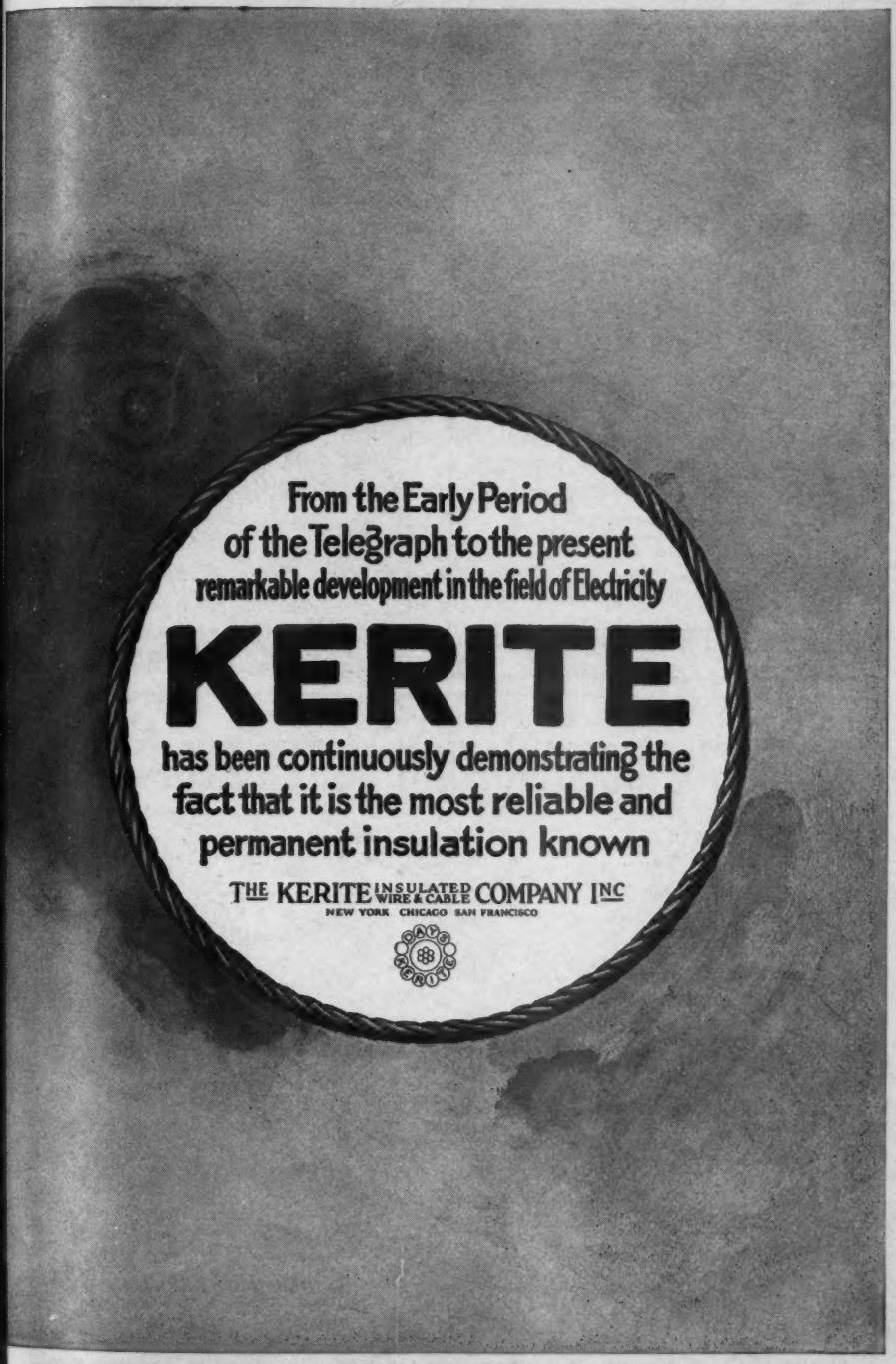
A special section covering machine tool equipment will be included in the next revision of the National Electrical Code, and will coordinate the provisions of that Code with the new standards.

Copies of "Machine Tool Electrical Standards" may be obtained from the American Standards Association, 29 West 39th Street, New York, at 40c per copy.

Rubber Products Standards

Other recently approved American Standards include five ASTM standards for testing rubber products and one ASTM specification for rubber gloves. The specification (C59.12-1942) is for electrical workers' rubber gloves of two classes: gloves intended for use without external protection; and gloves intended for use with external protection of leather or other material. The specification covers electrical properties, physical properties, thickness, marking of size, and even method of inspecting and packing the gloves. A separate section of the standard outlines tests for strength and for resistance to electric current.

These standards also may be obtained from the Association, at 25c per copy.



to increase the limitations on the F and G Bonds

be registered in the names of fiduci-

resulted from numerous requests by purchasers who asked the opportunity to put more money into the war program.

This is not a new Bond issue and not a new series of War Bonds. Thousands of individuals, corporations, labor unions, and other organizations have this year already purchased $50,000 of Series F and G Bonds, the old limit. Under the new regulations, however, these Bond holders will be permitted to make additional purchases of $50,000 in the remaining months of the year. The new limitation on holdings of $100,000 in any one calendar year in either Series F or G, or in both series combined, is on the cost price, not on the maturity value.

aries, corporations, labor unions and other groups, as well as in the names of individuals.

The Series F Bond is a 12-year appreciation Bond, issued on a discount basis at 74 percent of maturity value. If held to maturity, 12 years from the date of issue, the Bond draws interest equivalent to 2.53 percent a year; computed on the purchase price, compounded semiannually.

The Series G Bond is a 12-year current income Bond issued at par, and draws interest of 2.5 percent a year, paid semiannually by Treasury check.

Don't delay—your "fighting dollars" are needed *now*. Your bank or post office has full details.

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War Savings Bonds

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• This Directory is reserved for engineers, accountants, rate experts, consultants and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, financing, design and construction.

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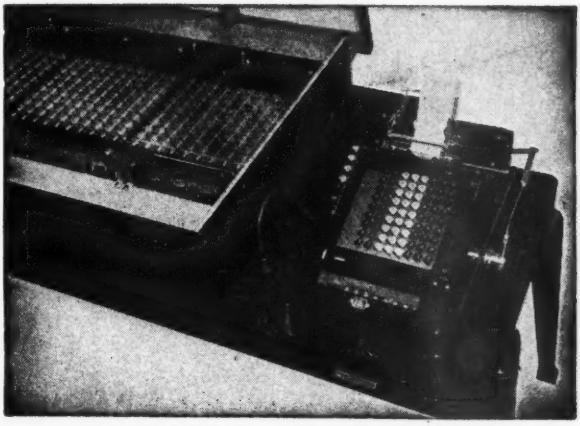

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102 Maiden Lane, New York, N. Y.

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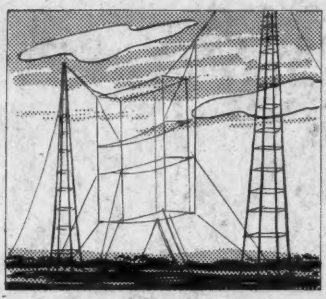
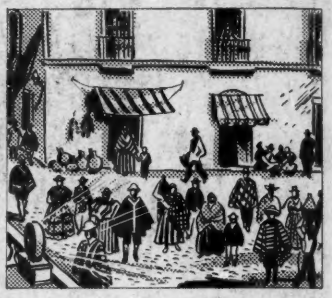
Towers of Truth

Chinese, Finnish, Tagalog, Dutch, Spanish—programs in more than a dozen tongues go out from the towers of General Electric stations WGEA and WGEO, Schenectady, and KGEI, San Francisco.



1. They provide authentic war information for news-starved peoples around the globe, entertainment for U.S. forces abroad. These G-E short-wave stations . . .



2. . . . have special antennas "pointed" at Australia, South America, China, Europe—making reception there almost as strong as from local stations.

3. They provided the only U.S. programs that reached Bataan. People in conquered lands risk their lives to listen. Smuggled letters say they bring hope of release.

4. Some announcers are regular G-E production employees, working on war work. They tell people in their native lands that America is determined on victory.

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